93-964

No. _____

Supreme Court, U.S.
FILED
DEC 17 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

CONSOLIDATION COAL COMPANY,

Petitioner,

v.

JOSEPH J. SKUKAN AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM S. MATTINGLY
(Counsel of Record)
JACKSON & KELLY
P. O. Box 619
Morgantown, West Virginia 26507
(304) 599-3000

DOUGLAS A. SMOOT
JACKSON & KELLY
P. O. Box 553
Charleston, West Virginia 25322
(304) 340-1000

Counsel for Petitioner, Consolidation Coal Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

80 PP

Questions Presented

i. Does section 7(c) of the Administrative Procedure Act allow a black lung claimant to secure an award of benefits with less than a preponderance of the evidence?

ii. Did the court of appeals err in holding that the burden of proof requires a claimant, as proponent of an order awarding benefits, need produce no more than equally probative evidence to receive benefits?

(Note: Petitioner reserves the right to argue the questions below in the event certiorari is granted on either of the above questions, but does not include questions iii. or iv. among the reasons for grant of certiorari).

iii. Did the court of appeals err in concluding the conflicting x-ray evidence was equally probative or in equipoise?

iv. Did the court of appeals err in reversing the determination that claimant had failed to prove disability was caused, at least in part, by coal workers' pneumoconiosis?

List of Parties and Rule 29.1 Statement

Joseph J. Skukan ("Skukan") is a claimant for benefits under the Black Lung Benefits Act. He was the petitioner in the court of appeals and is a respondent in this Court.

Consolidation Coal Company ("Consol") is the mine owner that last employed Skukan. Consol was the respondent in the court of appeals and is the petitioner in this Court.

The Director, Office of Workers' Compensation Programs, is the employee of the United States Department of Labor ("DOL" or "Labor") assigned general responsibility by the Secretary of Labor for the administration of the federal black lung benefits program. The Director, by delegation, is a statutory party in interest in black lung claims. 30 U.S.C. 932(k). The Director was a respondent in the court of appeals and is a respondent in this Court.

The parent companies of Consol are E. I. Dupont de Nemours, a Delaware corporation, and RWE AG, a German corporation. Consol's affiliates (other than wholly owned subsidiaries) are Greenon Coal Company, MTB, Inc., and Ninevah Coal Company.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties and Rule 29.1 Statement ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Statutes and Regulatory Provisions Involved 3

Statement of the Case 5

Reasons for Granting the Writ 11

Conclusion 17

Appendices

Denial of Motion for Rehearing or Reconsideration En Banc ..... App. 1

Opinion of Court of Appeals in *Skukan v. Consolidation Coal Company and Director, OWCP*, 993 F.2d 1228 (6th Cir. 1993) ..... App. 2

Opinion of United States Department of Labor, Benefits Review Board in *Skukan v. Consolidation Coal Company*, No. 88-3148 BLA and 88-3148 BLA-A (1992) ..... App. 29

Decision of Administrative Law Judge Michael P. Lesniak in *Skukan v. Consolidation Coal Company and Director, OWCP*, Case No. 84-BLA-9890 (1988) ..... App. 35

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Director, OWCP, 886 F.2d 818 (6th Cir. 1989) 8, 9

Charlton v. FTC, 543 F.2d 903 (D.C. Cir. 1976) 12

Conley v. Roberts and Schaefer Co., 7 Black Lung Rep. (MB) 1-309 (Ben.Rev.Bd. 1984) 5

Director, OWCP v. Mangifest, 826 F.2d 1318 (3d Cir. 1987) 8, 9, 17

Fidelity & Casualty Co. of New York v. Burris, 59 F.2d 1042 (D.C. Cir. 1932) 5

Freeman United Coal Mining Co. v. OWCP, 988 F.2d 706 (7th Cir. 1993), *reh'g denied*, 999 F.2d 291 (7th Cir. 1993) ..... *passim*

Greenwich Collieries v. Ondecko and Director, OWCP, 990 F.2d 730 (3d Cir. 1993) 9, 10, 11, 13, 14

Grizzle v. Pickands Mather & Co., 994 F.2d 1093 (4th Cir. 1993) 14

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 14, 15

Hillibush v. U.S. Department of Labor, 853 F.2d 197 (3d Cir. 1988) 10

Lessar v. C.F. & I Steel Corp., 3 Black Lung Rep. (MB) 1-63 (Ben.Rev.Bd. 1981) 5

Lincoln v. Vigil, 113 S.Ct. 2024 (1993) 15

Maher Terminals v. Director, OWCP and Santoro, 992 F.2d 1277 (3d Cir. 1993) 10, 13

TABLE OF AUTHORITIES – Continued

Page

Mullins Coal Co. v. Director, OWCP, 484 U.S. 135 (1987) ..... *passim*

NLRB v. Transportation Management, 462 U.S. 393 (1983) 14, 16

Pauley v. BethEnergy Mines, Inc., 111 S.Ct. 2524 (1991) 17

Pittston Coal Group v. Sebben, 488 U.S. 105 (1988) 17

Potomac Edison Power Co. v. Director, OWCP, 449 U.S. 268 (1980) 17

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)..... 16

Provance v. U.S. Steel Corp., 1 Black Lung Rep. (MB) 1-483 (Ben.Rev.Bd. 1978) 6, 16

Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988)..... 15

Steadman v. SEC, 450 U.S. 91 (1981) 14, 16

STATUTES AND REGULATIONS:

Administrative Procedure Act, as amended, 5 U.S.C. 551, *et seq.*

5 U.S.C. 554 ..... 4, 5

5 U.S.C. 556(d) ..... *passim*

28 U.S.C. 1254(1) 2

Black Lung Benefits Act, as amended, 30 U.S.C. 901, *et seq.*

30 U.S.C. 901 ..... 4, 5, 6

30 U.S.C. 932(a) ..... *passim*

30 U.S.C. 943(h) 13

30 U.S.C. 956 3

TABLE OF AUTHORITIES – Continued

Page

Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, *et seq.*

33 U.S.C. 919(d) 4, 5, 10

33 U.S.C. 921(c) 2, 5, 8, 10

Black Lung Program Regulations, 20 C.F.R.

20 C.F.R. 718.3(c) 4, 8, 12

20 C.F.R. 718.102(b) 7

20 C.F.R. 718.202(a)(1) 7

20 C.F.R. 718.403 ..... 4, 8, 12

20 C.F.R. 725.452(a) 5, 10

20 C.F.R. 725.481 7

20 C.F.R. Part 727 ..... 8, 12

MISCELLANEOUS:

Bernard Schwartz, *Administrative Law*, § 7.9, p. 360 (2nd Ed. 1984) 14

Employment Standards Admin., U.S. Department of Labor, Black Lung Benefits Act, Annual Report on Administration of the Act During Calendar Year 1991 (1992) 13

No. _____

In The

Supreme Court of the United States

October Term, 1993

CONSOLIDATION COAL COMPANY,

Petitioner,

v.

JOSEPH J. SKUKAN AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Consolidation Coal Company (Consol) respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above entitled proceeding on 18 May 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in *Skukan v. Consolidation Coal Company*

is reported at 993 F.2d 1228 and reprinted in the Appendix to this Petition ("App.") at 2. The court of appeals denied a petition for rehearing *en banc* which is reprinted in the Appendix at 1. The 23 March 1992 decision of the Benefits Review Board, the administrative decision reviewed by the court of appeals, has not been reported and is reprinted in the Appendix at 29. The 25 July 1988 decision of Administrative Law Judge Michael P. Lesniak has not been reported and is reprinted in the Appendix at 35.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its judgement on 18 May 1993. The court of appeals denied a timely filed petition for rehearing on 24 August 1993. App. 1. Jurisdiction was conferred on the court of appeals by the filing of a timely petition for review of the decision and order of the Benefits Review Board, in accordance with 33 U.S.C. 921(c) of the Longshore and Harbor Workers' Compensation Act incorporated by reference into 30 U.S.C. 932(a).

Justice John Paul Stevens granted the motion for extension to file petition for writ of certiorari to and including 17 December 1993. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). This petition has been filed within the time period provided by Supreme Court Rule 13.

STATUTES AND REGULATORY PROVISIONS INVOLVED

1. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), provides in part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

2. Section 507 of the Black Lung Benefits Act, 30 U.S.C. 956, provides in part:

> Except as otherwise provided in this Act, the provisions of sections 551-559 and sections 701-706 of title 5 [5 USCS §§ 551-559, 701-706] of the United States Code shall not apply to the making of any order, notice, or decision made pursuant to this Act, or to any proceeding for the review thereof.

3. Section 422 of the Black Lung Benefits Act, 30 U.S.C. 932(a), provides in part:

> [T]he provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927) [33 USCS §§ 901 et seq.], as amended, and as it may be amended from time to time . . . shall . . . be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine.

4. Section 19(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919(d), provides in pertinent part:

> Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of Section 554 of title 5.

5. Pertinent provisions of the Department of Labor's regulations implementing the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, include the following:

20 C.F.R. 718.3(c) provides:

> In enacting [the Black Lung Benefits] Act, Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. However, no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.

20 C.F.R. 718.403 provides:

> Except as provided in this subchapter, the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation.

20 C.F.R. 725.452(a) provides, in pertinent part:

> Except as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. 554 *et seq.*

STATEMENT OF THE CASE

This case involves the validity of a principle of weighing and resolving conflicting evidence in claims adjudicated under the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.* When evidence submitted by a miner and by the party opposing entitlement to benefits (either a coal mine operator or the Director, Office of Workers' Compensation Programs) is of equal weight, a true doubt situation is said to exist. Where a true doubt exists, the Benefits Review Board has consistently upheld the option of an ALJ to resolve such doubt in favor of the miner. *See Lessar v. C.F. & I Steel Corp.*, 3 Black Lung Rep. (MB) 1-63, 1-68 (Ben.Rev.Bd. 1981); *Conley v. Roberts and Schaefer Co.*, 7 Black Lung Rep. (MB) 1-309, 1-312 n.4 (Ben.Rev.Bd. 1984). True doubt has no statutory origin. It can be traced to a 1932 decision in a case considered under the Longshore and Harbor Workers' Compensation Act (LHWCA). *Fidelity & Casualty Co. of New York v. Burris*, 59 F.2d 1042, 1044 (D.C. Cir. 1932). When Congress enacted the BLBA, many provisions of the LHWCA, including its procedures for the processing and adjudication of claims, were incorporated into the BLBA. 30 U.S.C. 932(a) incorporating, *inter alia*, 33 U.S.C. 919-921. The Benefits Review Board, which considers appeals of both BLBA and LHWCA claims, transferred the use of true doubt under LHWCA

to black lung claims. *Provance v. U.S. Steel Corp.*, 1 Black Lung Rep. (MB) 1-483, 1-486 (Ben.Rev.Bd. 1978).

I. Nature of the Case

This proceeding commenced with the filing of a claim for disability benefits under the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. 901 *et seq*. The BLBA is a federal program to compensate coal miners and their families for total disability or death due to coal workers' pneumoconiosis. 30 U.S.C. 901(a). Joseph J. Skukan seeks disability benefits claiming to be totally disabled by a disease arising out of his employment in and about the coal mines. The named employer, Consolidation Coal Company, contests liability. After the initial denial of the application, a Deputy Commissioner of the Department of Labor's Office of Workers' Compensation Programs referred this matter to the Office of Administrative Law Judges at the request of Joseph Skukan.

An evidentiary hearing was conducted before U.S. Department of Labor Administrative Law Judge (ALJ) Michael P. Lesniak at which time the parties were allowed to proffer evidence and argument. Although finding the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that there was a disabling pulmonary impairment, the ALJ denied the claim, finding the evidence failed to prove that the disabling pulmonary disease was caused by coal workers' pneumoconiosis. App. 54.

In finding the existence of pneumoconiosis, the ALJ considered twenty-one x-ray interpretations. *See* 20 C.F.R.

718.202(a)(1). Of the twenty-one interpretations, seven are consistent with pneumoconiosis (interpreting the x-rays as revealing opacities classified in a profusion of 1/0 or greater; *see* 20 C.F.R. 718.102(b)) while fourteen interpretations reveal changes insufficient to diagnose pneumoconiosis. The ALJ found fifteen of the x-ray interpretations are by NIOSH certified B-readers.[1] Of these readings by the more qualified B-readers, two of the fifteen readings, both by the same physician, are indicative of pneumoconiosis. Presented with this record, the ALJ found, "I have a true doubt as to whether the claimant has pneumoconiosis and, giving the benefit of the doubt to the claimant, I find that the claimant has established the presence of pneumoconiosis based upon chest x-ray evidence." App. 42.

Skukan appealed to the Department of Labor's Benefit Review Board (BRB). *See* 20 C.F.R. 725.481. After consideration of the issues raised on appeal, the BRB affirmed the ALJ's denial of benefits based on the finding that the evidence failed to prove disability due to coal workers' pneumoconiosis. App. 32-33. The BRB rejected the employer's challenge to the ALJ's use of the true doubt principle to resolve the conflicting x-ray evidence. The BRB concluded the ALJ "considered the conflicting x-ray evidence . . . and permissively found that true doubt existed on the issue of the existence of pneumoconiosis." App. 33.

---

[1] A B-reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n.16 (1987); 20 C.F.R. 718.202(a)(1)(ii)(E).

Skukan next sought review before the court of appeals. 30 U.S.C. 932(a), *incorporating* 33 U.S.C. 921(c). The court first reaffirmed prior decisions noting a claimant must prove he/she has pneumoconiosis to receive black lung benefits and that chest x-rays produced by the claimant must show the presence of pneumoconiosis by a preponderance of the evidence. *Adams v. Director, OWCP*, 886 F.2d 818, 820 (6th Cir. 1989)(citing 20 C.F.R. 718.403); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1320 (3d Cir. 1987); App. 13. The court then reviewed this Court's decision in *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987), which dealt with the burden of proof requirements under 20 C.F.R. Part 727, the predecessor to Part 718 claims. *Mullins* was interpreted to have neither expressly nor definitely said that the true doubt rule remains valid (in light of its holding that the preponderance of the evidence standard is to be applied before a claimant can get the Part 727 interim presumption), but the Court did not strike it down as invalid either. Concerned by the nebulous nature of the Court's opinion in *Mullins*, the decisions of other circuit courts addressing true doubt were reviewed. App. 17.

After consideration of the BLBA and the implementing regulations, the court held that the "APA and Section 718.403 are not violated when the true doubt rule is utilized to have equally probative but conflicting evidence weighed in favor of the claimant". App. 26-27. The true doubt principle was believed to advance the goals of the BLBA, not as expressed in statutory provisions, but as embodied in the legislative history. The principle was also consistent with the implementing regulations. Section 718.3(c) was believed to command claimants be

given the benefit of all reasonable doubt. App. 25. Substantial evidence was found to support the ALJ's resolution of the conflicting x-ray evidence in favor of Skukan based on a true doubt weighing of equally probative but contradictory medical evidence. Despite providing reference to the prior decisions requiring a claimant prove pneumoconiosis by a preponderance of the evidence in *Adams* and *Mangifest*, the court adopted a standard allowing proof by less than a preponderance of the evidence. The court then independently reweighed the evidence of record, reversing the ALJ's finding regarding disability causation, and ruled benefits be awarded to Skukan.

Aggrieved by the reversal of a denial of benefits previously entered by the Deputy Commissioner, an Administrative Law Judge, and affirmed by the Benefits Review Board, Consol moved for rehearing or reconsideration by the United States Court of Appeals for the Sixth Circuit sitting *en banc*. Less than a majority of the judges voted to hear Consol's petition and the motion for rehearing or rehearing *en banc* was denied. App. 1.

II. Related Cases

Contemporaneous with the Sixth Circuit's consideration of this case, similar disability claims with challenges to reliance on the true doubt principle were under consideration before the Third and Seventh Circuits. In *Greenwich Collieries v. Ondecko and Director, OWCP*, 990 F.2d 730 (3d Cir. 1993), the Third Circuit considered use of the true doubt principle in a case arising under the Black Lung Benefits Act (BLBA). Reliance on the true doubt principle to resolve conflicting evidence was found

to violate the burden of persuasion required by the Administrative Procedure Act, 5 U.S.C. 556(d), which is incorporated into the BLBA. 30 U.S.C. 932(a) incorporating 33 U.S.C. 921(c); *Hillibush v. U.S. Department of Labor*, 853 F.2d 197 (3d Cir. 1988); 33 U.S.C. 919(d); 20 C.F.R. 725.452(a). Rather than present equally probative evidence, a preponderance of the evidence is required to meet the burden of persuasion required by the APA.

The Third Circuit reached a similar conclusion concerning the use of "true doubt" in *Maher Terminals v. Director, OWCP and Santoro*, 992 F.2d 1277 (3d Cir. 1993), regarding a claim seeking benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA). Petitions for rehearing in *Greenwich* and *Maher* were denied by the Third Circuit in orders issued 25 June 1993. *Greenwich*, No. 92-3270 (3d Cir. June 25, 1993); *Maher*, No. 92-3222 (3d Cir. June 25, 1993).

Contemporaneously, the Seventh Circuit considered a claim arising from BLBA and held reliance on "true doubt" to resolve conflicting evidence is acceptable and does not violate the APA. *Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs*, 988 F.2d 706 (7th Cir. 1993). The Seventh Circuit denied a petition for rehearing in the *Freeman* case, specifically noting that any confusion in Supreme Court's opinions concerning the true doubt principle or the burden of proof assigned to the miner seeking benefits should be resolved by the Court to end the appellate discord. 999 F.2d 291 (7th Cir. 1993).

REASONS FOR GRANTING THE WRIT

The court of appeals erred in validating the use of the "true doubt" principle in claims adjudicated under the Black Lung Benefits Act (BLBA). This case arising from the Sixth Circuit, like the decisions of the other circuits that have addressed the "true doubt" issue, is of importance in the administration of the BLBA, the Longshore and Harbor Workers' Compensation Act (LHWCA) and the Administrative Procedure Act (APA). As now positioned the circuits have offered an array of interpretations regarding the validity of the "true doubt" principle to resolve claims under the BLBA and APA. *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228 (6th Cir. 1993); *Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs*, 988 F.2d 706 (7th Cir. 1993); *contra Greenwich Collieries v. Ondecko and Director, OWCP*, 990 F.2d 730 (3d Cir. 1993). The conflicting appellate decisions will disrupt the administration and litigation of these claims. The Solicitor General agrees having petitioned for certiorari in the claims arising out of the Third Circuit. No. 93-744. The Petitioner consents to hold this case in abeyance pending resolution of the claims arising out of the Third Circuit.

1. At least two circuit courts, including the Sixth Circuit in this case, have validated use of the true doubt principle, ruling that principle does not violate the BLBA, its implementing regulations, or Section 7(c), 5 U.S.C. 556(d), of the APA. Absent specific presumptions, the BLBA provides no guidance as to the burdens of production or persuasion and which party shoulders the burdens. Rather than clear the muddled water, the BLBA's implementing regulations provide only further confusion.

Section 718.403, entitled Burden of Proof, provides the burden of proving a fact alleged shall rest with the party making such allegation. Apparently, this section provides a burden of persuasion requiring a preponderance of the evidence. Section 718.3(c), entitled Scope and Intent, provides Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. Relying on this latter provision, the Sixth Circuit validated the use of the true doubt principle, allowing a claimant to "establish" a fact alleged by less than a preponderance of the evidence.

That holding is inconsistent with the Court's holding in *Mullins*. The question presented in *Mullins* concerned "the burden of proof that the claimant must satisfy to invoke the presumption" of 20 C.F.R. Part 727. *Mullins*, 484 U.S. at 138. The Court adopted the Secretary of Labor's position that the "regulation requires the claimant to establish at least one of the four qualifying facts by a preponderance of the evidence." *Id.* Validating the use of the true doubt principle is inconsistent with the burden of proof regulation and *Mullins*.

In American law a preponderance of the evidence standard is rock bottom at the fact-finding level of civil litigation. Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating "something less than the weight of the evidence." *Charlton v. FTC*, 543 F.2d 903, 907 (1976). The "true doubt" principle departs from the traditional preponderance of the evidence standard.

The proposition that the APA permits an agency to allow fact finding on less than a preponderance of the evidence, without explicit statutory directive, is an issue of controlling importance in the federal administrative system with a direct bearing for on-the-record adjudication for many federal agencies. The Sixth Circuit's determination validating a lesser burden of persuasion under the BLBA, directly conflicts with the preponderance of the evidence standard required by the APA and with the Third Circuit's interpretation of the burden of persuasion required by the APA. *Greenwich Collieries*, 990 F.2d 730; *Maher Terminals*, 992 F.2d 1277. Granting the writ of certiorari would permit this Court to resolve the conflict among the circuits regarding the validity of "true doubt" considering the burden of proof required in claims controlled by Section 7(c) of the APA. 5 U.S.C. 556(d). To promote a uniform interpretation of the APA across the federal circuits, this Court should resolve the question here presented.

As reported by Secretary of Labor Lynn Martin to Congress, *see* 30 U.S.C. 943(h), for the period 1 January to 31 December 1991, the DOL received 8,167 new claims under BLBA and made administrative decisions on 6,147. *See* Employment Standards Admin., U.S. Department of Labor, Black Lung Benefits Act, Annual Report on Administration of the Act During Calendar Year 1991, at 3 (1992). The use of the true doubt principle, despite

judicial belief it seldomly would appear,[2] could effect many of these claims. As illustrated by this claim, the ALJ resorted to true doubt to resolve a two to thirteen conflict in the x-ray interpretations among the more qualified B-readers.

2. Granting the writ of certiorari would allow the Court to quiet the circuits' conflicting interpretations of this Court's prior holdings in *Steadman v. SEC*, 450 U.S. 91 (1981), *NLRB v. Transportation Management*, 462 U.S. 393 (1983), and *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983). Compare *Freeman United Coal Mining Co. v. OWCP*, 999 F.2d 291 (1993); *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (1993). Previously it was understood that a preponderance of the evidence burden of persuasion was enunciated in *Steadman v. SEC*. Bernard Schwartz, *Administrative Law*, § 7.9, p. 360 (2nd Ed. 1984).

The Third Circuit reasoned a black lung claimant carried a burden of persuasion satisfied by a preponderance of the evidence. The Sixth and Seventh Circuits instead rely on a footnote in *Transportation Management* to construe Section 7(c) of the APA, 5 U.S.C. 556(d), to address only the burden of going forward, not the burden of ultimate persuasion. *Freeman United*, 999 F.2d 291; *Skukan*, App. 21.

3. The panel of the Sixth Circuit relies on snippets from the legislative history to support the "humanitarian notion" that the BLBA is remedial in nature, adopting an

---

[2] *See Mullins Coal Co.*, 484 U.S. at 163, n.2 (Marshall, J., dissenting); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993).

evidentiary rule nowhere embodied in the words of the statute. Without any statutory authority, the court departs from the traditional proof by a preponderance of the evidence standard employed in civil or administrative proceedings. *See Herman & McLean v. Huddleston*, 459 U.S. at 390. The Sixth Court extracted portions of legislative history addressing *disability* to depart from the traditional preponderance of the evidence standard with regard to the *existence* of pneumoconiosis. App. 21-24. The panel went so far as to quote from a 19th Century fictional account by a French author cited in the legislative history to justify its reversal of the denial of benefits. App. 22.

This matter provides further opportunity to caution circuit courts from quoting from indecisive legislative history to support a certain desired result. *See Lincoln v. Vigil*, 113 S.Ct. 2024 (1993). Excerpts from a legislation history may evidence congressional intent. But unenacted approvals, beliefs, and desires are not laws. *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988).

As a panel of the Seventh Circuit in *Freeman* aptly suggests:

> To find rules of law we must consult the statutory text. The Black Lung Benefits Act contains many substantive and evidentiary rules favorable to claimants, but no true doubt rule or any facsimile. To deploy such a rule on the basis of legislative benevolence that also accounts for the statutory presumptions is to count the magnanimous impulse twice. Tilting the burdens in miners' favor is especially questionable for claims filed in 1982 and later, for the potent presumptions that the Senate Report of 1972

sought to justify have vanished. The Benefits Review Board announced in 1978 that a true doubt rule would be employed to decide black lung cases, *Provance v. United States Steel Corp.*, 1 Black Lung Rep. 1-483 (BRB 1978), but did not use it often for pre-1982 claims. See *Mullins*, 484 U.S. at 163 n.2 (Marshall, J., dissenting)("The Director has failed to bring to our attention . . . [even] one instance in which the true-doubt rule actually has been applied by an ALJ in evaluating a miner's claim."). In recent years the rule has become ubiquitous and has on occasion been applied to pre-1982 claims, as in this case. Can it be that the Board has set out to strengthen the presumptions for pre-1982 claims and to re-create them for later ones, overriding the contrary judgment of Congress?

Mullins offered the Supreme Court an opportunity to decide whether the true doubt rule comports with the APA and the Black Lung Benefits Act. The Court ducked. 484 U.S. at 161 n.35. Although some of the Court's cases, such as *Steadman*, say that § 7(c) of the APA creates a preponderance standard, other cases, such as *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n.7 (1983), say that an agency may change the assignment of burdens on at least some issues in a case. Cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Nothing our court could do would resolve the tension in the Supreme Court's opinions or end the appellate discord about the true doubt rule. Problems of our own making should be cleared up locally. When our panel's decision is but a symptom of a more widespread problem, however, we should

> let the case proceed to the only tribunal that can supply the cure.

999 F.2d at 292-93.

The BLBA and its regulations be they "byzantine," "impenetrable," or "the result of scrivener's error," never expressly provide a burden of proof to claimants of less than a preponderance of the evidence. *See Pauley v. BethEnergy Mines, Inc.*, 111 S.Ct. 2524, 2535 (1991); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 129 (1988) (Stevens, J., dissenting in part). The BRB is not a policy maker and its adoption of an evidentiary rule is owed no deference. *Potomac Edison Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1323 (3d Cir. 1987). The BRB's employ of the true doubt principle is not persuasive precedent or reason to continue to apply a burden of proof inconsistent with that mandated by the APA.

Accordingly, Petitioner, Consolidation Coal Company, submits that a writ of certiorari should issue because the federal courts have issued conflicting interpretations applying the burden of persuasion under the Black Lung Benefits Act and in construing the meaning of Section 7(c) of the Administrative Procedures Act.

CONCLUSION

The court of appeals' decision interprets the burden of persuasion for claimants under the Black Lung Benefits Act in a way that is unsupported by the language of the Black Lung Benefits Act, the pertinent regulations, or the Administrative Procedure Act. This interpretation

exposes both coal mine operators and the Black Lung Disability Trust Fund, to additional liability in thousands of Black Lung claims. For these reasons, Petitioner, Consolidation Coal Company, respectfully submits that its petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM S. MATTINGLY
(Counsel of Record)
JACKSON & KELLY
P. O. Box 619
Morgantown, West Virginia 26507
(304) 599-3000

DOUGLAS A. SMOOT
JACKSON & KELLY
P. O. Box 553
Charleston, West Virginia 25322
(304) 340-1000

No. 92-3281

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH J. SKUKAN,

Petitioner,

v.

CONSOLIDATION COAL COMPANY COMPANY, ET AL.,

Respondents.

ORDER

(Filed AUG 24 1993)

BEFORE: KEITH and JONES, Circuit Judges; AND JOINER, *Senior District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

---

*Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 92-3281

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPH J. SKUKAN,
Petitioner,

v.

CONSOLIDATION COAL COMPANY;
DIRECTOR, OFFICE OF
WORKERS' COMPENSATION
PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR,
Respondents.

ON PETITION for Review of
a Decision and Order of
the Department of Labor
Benefits Review Board

Decided and Filed May 18, 1993

Before: KEITH and JONES, Circuit Judges; and JOINER, Senior District Judge.*

---

*The Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

NATHANIEL R. JONES, Circuit Judge. Petitioner Joseph J. Skukan seeks review of a Benefits Review Board ("BRB") decision denying his application for black lung disability benefits pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1988 & Supp. II 1990) [hereinafter "Act"]. In addition, Respondent Consolidation Coal Company ("Consolidation") seeks a determination of whether the "true doubt rule" is violative of the black lung disability benefits regulations and Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (1988) [hereinafter the "APA"]. If we decide to reverse the BRB's decision, Consolidation also seeks a remand to the BRB for a determination of certain factual findings made by the Administrative Law Judge ("ALJ"). For the reasons stated herein, we reverse the BRB's decision and order that Skukan be awarded benefits. We conclude that the true doubt rule is not violative of the regulations or the APA. Finally, we reject Consolidation's invitation to remand the case to the BRB.

I.

Skukan filed an application for black lung benefits with the United States Department of Labor in February 1983. After reviewing the evidence assembled, a Department of Labor deputy commissioner determined that there was insufficient evidence to support Skukan's claim for entitlement to benefits.[1] After the deputy

---

[1] Among the evidence submitted to the deputy commissioner by Consolidation, Skukan's last employer of at least one year's duration, was a medical examination by Dr. Robert B. Altmeyer, MD.

commissioner rendered a decision denying benefits, Skukan requested a hearing before an ALJ.

The ALJ held a hearing on June 4, 1987. Prior to the hearing, Skukan proffered the examination reports of Drs. Samson D. Reyes, MD, J.P. Tipton, MD, and Macy I. Levine, MD. Dr. Levine's April 3, 1987 examination was offered on May 5, 1987, just prior to the deadline for submitting evidence for the June 4, 1987 hearing. Because of this relatively late submission, Consolidation requested an opportunity to submit another examination. Skukan objected to that request. The ALJ, in overruling Skukan's objection, allowed Consolidation the opportunity to examine Skukan and submit additional medical evidence. Dr. Altmeyer examined Skukan on May 13, 1987 and then submitted his findings to the ALJ. Skukan was then given the opportunity to get another examination. He arranged for and attended an examination by Dr. Thomas P. Connelly, MD, on June 17, 1987 and submitted that examination report as evidence.

In a written opinion, the ALJ found, on the basis of conflicting X-ray evidence and pursuant to the true doubt rule, that Skukan had pneumoconiosis. The ALJ then found that Skukan proved, with the benefit of a rebuttable presumption which Consolidation failed to rebut, that his pneumoconiosis arose, at least in part, out of coal mine employment.

The ALJ's then summarized the medical reports and opinions:

> Dr. DelVecchio diagnosed chronic bronchitis and gave no disability evaluation. Dr. Altmeyer

> diagnosed chronic bronchitis and mild hypoxemia at rest and did not believe the Claimant [i.e., Skukan] was disabled. Dr. Reyes diagnosed mild emphysema, chronic obstructive lung disease and chronic bronchitis and gave no disability evaluation. Dr. Tipton diagnosed chronic obstructive pulmonary disease and gave no disability evaluation. Dr. Levine found pneumoconiosis and normal ventilatory studies, but failed to take blood gas studies, although Claimant's exercise tolerance test was abnormal. He believed the Claimant was totally disabled due to coal dust exposure but did not discuss Claimant's long history of cigarette smoking to my satisfaction. Dr. Garson reviewed Dr. Altmeyer's blood gas studies and ventilatory studies and did not agree with Dr. Altmeyer's interpretation. Dr. Connelly felt that the Claimant had pneumoconiosis. He relied upon a Board-Certified Radiologist who found pneumoconiosis and I feel in combination with his deposition and testimony, he took into account Claimant's long history of cigarette smoking. Dr. Morgan reviewed various medical reports and opinions of other physicians and found that the Claimant did not have a significant respiratory impairment.

J.A. at 20. After summarizing the evidence, the ALJ stated: "Based upon the overwhelming evidence in my view, Claimant is in fact disabled due to a respiratory condition and certainly cannot return to work as a coal miner. However, I find that he has failed to show a nexus between his pneumoconiosis and his respiratory impairment." *Id.* at 21.

In finding that Skukan failed to establish the required nexus between his pneumoconiosis and his respiratory impairment, the ALJ noted:

> Claimant's most favorable evidence are the opinions of Drs. Levine and Connelly. Dr. Levine fails to take into account Claimant's long history of cigarette smoking and I give his report less weight than the opinion of Dr. Connelly. Dr. Connelly's opinion is outweighed by the opinions of Dr. Altmeyer and Dr. Morgan since those two physicians' opinions seem to follow logically the diagnostic studies which they reviewed. Thus, their reports seem more well reasoned than the report of Dr. Connelly. While the cross-examination of Dr. Altmeyer was revealing and effective, it was insufficient to show true bias on the part of Dr. Altmeyer or that Dr. Altmeyer would lie under oath. While Dr. Garson may have disagreed with Dr. Altmeyer's interpretation of 1984 blood gas studies and vent studies, no physician discredited Dr. Altmeyer's most recent report on May 14, 1987. There is no circumventing the fact that Dr. Connelly based his conclusion on Claimant's subjective complaints and a chest x-ray. While his report may establish that the Claimant has pneumoconiosis and that he has a respiratory impairment, this report does not provide the nexus between the two. He agreed that Claimant's cigarette smoking was significant and that he was overweight. I believe the greater weight of the evidence shows that, as Dr. Morgan explained in his report of May 4, 1987, Claimant's hypoxemia can be attributed to his obesity and cigarette smoking. For these reasons, I feel the greater weight of the evidence

> fails to show that the Claimant's pneumoconiosis has caused his totally disabling respiratory or pulmonary impairment.

Id. The ALJ'S findings that Dr. Connelly's report fails to show a nexus between pneumoconiosis and his respiratory impairment contradicts the ALJ's earlier notations that "[i]n Dr. Connelly's opinion, Claimant's long cigarette smoking history would produce some of his symptoms. However, *his primary disability is due to pneumoconiosis.* . . . In Dr. Connelly's opinion, *Claimant's 37 years of coal mining and dust exposure is a more significant factor and a predominant cause for the Claimant's disability.*" *Id.* at 20 (emphasis added).

The ALJ concluded that Skukan failed to show that his respiratory impairment was caused by his pneumoconiosis, and that Skukan is not entitled to benefits under the Act. As a result, the ALJ denied Skukan benefits.

Both Skukan and Consolidation appealed the ALJ's decision to the BRB. The BRB affirmed the ALJ's decision and order denying benefits.

II.

Our scope of review is limited – if the ALJ's findings are supported by substantial evidence and are in accordance with the applicable law, the ALJ's findings are conclusive. *Neace v. Director, OWCP,* 867 F.2d 264, 267 (6th Cir. 1989); *Welch v. Benefits Review Bd.,* 808 F.2d 443, 445 (6th Cir. 1986). Substantial evidence has been defined as " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Ramey v.*

Kentland Elkhorn Coal Corp., 755 F.2d 485, 488 (6th Cir. 1985) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938))). As the Seventh Circuit stated:

> The substantial evidence test required in black lung cases is less rigorous than the burden of proof in a jury trial. In reviewing findings of the trier of fact, the court cannot reweigh evidence, but may only inquire into the existence of evidence to support the findings. Thus, the reviewing court may not set aside an inference because it finds an opposite one more reasonable, or because it questions its factual basis.

Peabody Coal Co. v. Benefits Review Bd., 560 F.2d 797, 802 (7th Cir. 1977) (citations omitted). In deciding whether a decision meets the substantial evidence requirement, the court may consider whether an ALJ adequately explained the reasons for crediting certain testimony and evidence over other evidence in the record. *Director, OWCP v. Congleton*, 743 F.2d 428, 430 (6th Cir. 1984).

III.

Skukan first contends that substantial evidence does not support the ALJ's decision regarding disability causation. As noted above, the ALJ found that Skukan proved that he had pneumoconiosis; that he engaged in coal mine employment which caused his pneumoconiosis; and that Skukan was totally disabled. The ALJ also found, however, that Skukan did not prove that his pneumoconiosis caused, at least in part, his total disability.

Since Skukan's claim was filed after March 31, 1980, the ALJ properly evaluated Skukan's claim under the

permanent regulations found at 20 C.F.R. pt. 718 (1992). *Adams v. Director, OWCP*, 886 F.2d 818, 820 (6th Cir. 1989). Skukan must prove the following facts to receive black lung benefits: 1) that he suffers from pneumoconiosis; 2) that his pneumoconiosis arose, at least in part, out of his coal mine employment; and 3) that he is totally disabled due to, at least in part, pneumoconiosis. *Id.* at 820, 825.

In challenging the ALJ's conclusions, Skukan argues that the evidence clearly shows that his totally disabling respiratory impairment was due, at least in part, to his pneumoconiosis. Skukan is correct that some of the evidence does tend to show that his disability was due to pneumoconiosis. In particular, Drs. Levine and Connelly specifically note that, in their opinion, the disability causation requirement has been met.[2] There is also evidence, however, by Dr. Altmeyer and Dr. Morgan which may substantially support the ALJ's decision.

As a result, our review of the ALJ's decision boils down to whether the ALJ applied the law correctly.

A.

Skukan first argues that the ALJ erred by ordering him to submit to a second examination, over his objection. Pursuant to 20 C.F.R. § 725.456(e) (1992), the ALJ has

---

[2] Skukan also argues that he presented evidence from Drs. Levine, Connelly, Reyes, Tipton, and DelVecchio which shows that disability causation was proven by showing that breathing airways were obstructed by pneumoconiosis and by showing that other ailments which may have caused total disability may have been aggravated by pneumoconiosis. The ALJ did not specifically address those contentions in his opinion.

the discretion to order a second employer-sponsored physical exam of the claimant. *Cf. Amax Coal Co. v. Director, OWCP,* 892 F.2d 578, 581 (7th Cir. 1989). Section 725.456(e) provides the ALJ with the discretion to provide for further evidentiary development when "it is determined by the administrative law judge that the documentary evidence . . . is incomplete as to any issue which must be adjudicated." Furthermore, the ALJ has a duty to provide the parties a fair hearing. 20 C.F.R. § 725.455(c) (1992); *Amax,* 892 at 581.

Under the Act, the crucial inquiry is whether a claimant is disabled due to pneumoconiosis at the time of the hearing. *Cooley v. Island Creek Coal Co.,* 845 F.2d 622, 624 (6th Cir. 1988). Therefore, the ALJ, in its discretion, could permit the parties an opportunity to develop and present more recent evidence. Based on the facts of this case, it was not an abuse of discretion for the ALJ to order a second examination. Because three years had elapsed between the time of Consolidation's first physical examination of Skukan, allowing Consolidation an opportunity to submit a second examination was a reasonable way of providing a fair hearing in this case. The ALJ further allowed Skukan to submit additional evidence after Consolidation submitted the second medical report. Therefore, Skukan's argument on this score is without merit.

B.

Skukan argues that the ALJ did not merely weigh the evidence against him, but rather misconstrued the

evidence and then proceeded to weigh the evidence against him.[3] We agree.

We find that the ALJ did not merely weigh the evidence against Skukan. Rather, we find that the ALJ unsatisfactorily dealt with evidence to the contrary, and then weighed the negative evidence against him. *Cf. Congleton*, 743 F.2d at 430.

Of particular moment is the way the ALJ treated the evidence which showed pneumoconiosis causing total disability. For example, the ALJ mischaracterized the report of Dr. Connelly. The ALJ says, "While [Dr. Connelly's] report may establish that the Claimant has pneumoconiosis and that he has a respiratory impairment, this report does not provide the nexus between the two." J.A. at 21. Dr. Connelly, however, clearly and explicitly deals with the disability causation requirement by stating:

> Because of this patient's history, physical examination, and clinical findings, it is my [professional] opinion that he has coal worker's pneumoconiosis. In addition, it is my professional opinion, with reasonable medical certainty, *that the coal worker's pneumoconiosis is the result of his total and cumulative time time [sic] spent as an active coal miner and has rendered him totally and permanently disabled.*

Id. at 218 (emphasis added).

---

[3] Skukan points to many other alleged errors by the ALJ. Because we find the following alleged error to have merit, which ultimately requires that we grant Skukan the relief he seeks, we decline to review the other alleged errors.

In addition to unsatisfactorily dealing with contrary evidence, we find that the ALJ inappropriately relied on reports of Dr. Altmeyer and Dr. Morgan relative to the causation issue. On the one hand, the ALJ holds that "[b]ased upon the overwhelming evidence in my view, Claimant is in fact disabled due to a respiratory condition." *Id.* at 21. Juxtaposed with this assessment are the reports of Dr. Altmeyer and Dr. Morgan which hold that Skukan is not totally disabled. In addition to finding no disability, both doctors concluded that Skukan did not have pneumoconiosis, contrary to the view of the ALJ, based on the evidence presented. Therefore, Dr. Altmeyer's and Dr. Morgan's conclusions about causation or lack thereof are of little help to the analysis. While we have stated in an unpublished opinion that the ALJ may consider opinions of physicians who found no pneumoconiosis when making the determination of causation, *see Castle v. Director, OWCP,* No. 90-3041, 1990 U.S. App. LEXIS 19818, at *9 (6th Cir. Nov. 7, 1990) ("The ALJ is entitled to hear all medical evidence and assign levels of credibility to each."), *cert. denied,* 111 S. Ct. 2896 (1991), we conclude that the better way for the ALJ to proceed is to treat as less significant those physicians' conclusions about causation when they find no pneumoconiosis. *See Adams,* 886 F.2d at 826 (this Court held that where a physician incorrectly concluded that the claimant was not suffering from pneumoconiosis, the ALJ *"properly* rejected [the physician's] conclusion as to etiology") (emphasis added).

Because Dr. Altmeyer's and Dr. Morgan's reports are of little help with respect to causation, we are left with Dr. Connelly's and Dr. Levine's reports which conclude

that Skukan's pneumoconiosis was a cause of his totally disabling respiratory impairment as the most significant probative evidence on this question in the record. We hold that Skukan has satisfied his burden of showing that his total disability was "due to" pneumoconiosis.

IV.

Consolidation cross-appeals, arguing that: 1) the ALJ's determination that the radiographic evidence supports a finding of Skukan's pneumoconiosis is based upon an incorrect application of the law and is not supported by substantial evidence; and 2) the ALJ erred in weighing the evidence concerning the existence of a disabling pulmonary impairment under Section 718.204(c) (1992).

A.

As stated earlier, one of the things that a claimant must prove in order to receive black lung benefits is that he/she has pneumoconiosis. Pursuant to Section 718.202(a)(1) (1992), pneumoconiosis can be established by producing chest X rays which show the existence of pneumoconiosis. The chest X rays produced by the claimant must show the presence of pneumoconiosis by a preponderance of the evidence. *Adams,* 886 F.2d at 820 (citing 20 C.F.R. § 718.403; *Director, OWCP v. Mangifest,* 826 F.2d 1318, 1320 (3d Cir. 1987)).

In weighing the radiographic evidence of record in this case, the ALJ noted that there was equally probative but conflicting X-ray evidence regarding whether Skukan has pneumoconiosis, however, pursuant to the true doubt rule, the ALJ gave the benefit of the doubt to Skukan and thus

found that Skukan had established the presence of pneumoconiosis based upon chest X-ray evidence. The BRB has defined the true doubt rule as follows:

> "True doubt" is said to exist if equally probative but contradictory medical documents and testimony are presented in the record, and selection of one set of facts would resolve the case against the claimant but the selection of the contradictory set of facts would resolve the case for the claimant.

Conley v. Roberts & Schaefer Co., 7 Black Lung Rep. (MB) 1-309, 1-312 n.4 (Ben. Rev. Bd. July 16, 1984). Consolidation argues that the use of the true doubt rule is violative of the APA[4] and 20 C.F.R. § 718.403 (1992).[5]

Consolidation first argues that the ALJ's use of the true doubt rule violated the burden of proof required under Section 7(c) of the APA and Section 718.403. In addition, Consolidation implies that the rule lowers the

---

[4] Section 7(c) of the APA provides, in pertinent part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

The Supreme Court has held that this section establishes a preponderance of the evidence burden of proof on the proponent of a rule or order. *Steadman v. SEC*, 450 U.S. 91, 100-01 (1981).

[5] 20 C.F.R. § 718.403 provides that the burden of proving a fact alleged in connection with any provision of Part 718 shall rest with the party making such allegation.

preponderance of the evidence standard as required under the APA and, presumably, under the regulations.

B.

The Supreme Court, in *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135 (1987), dealt with the burden of proof requirements under 20 C.F.R. pt. 727 claims, the predecessor to Part 718 claims.[6] Under § 727.203(a) (1992), a claimant who engaged in coal mine employment for at least 10 years is entitled to an "interim presumption" of eligibility for disability if he/she meets one of four evidentiary requirements: 1) a chest X ray "establishes" the presence of pneumoconiosis; 2) ventilatory studies establish the presence of a chronic respiratory or pulmonary disease of a specified severity; 3) blood gas studies demonstrate an impairment in the transfer of oxygen from the lungs to the blood; or 4) other medical evidence, including the documented opinion of a physician exercising reasonable medical judgment, establishes a totally disabling respiratory or pulmonary impairment. 20 C.F.R. § 203(b) (1992) provides that "all relevant medical evidence shall be considered" in the adjudication of a claim, and that the interim presumption is rebutted if the evidence establishes: 1) that the claimant is doing his/her usual or comparable work; 2) that he/she is capable of doing such work; 3) that his/her disability did not arise,

---

[6] Generally, 20 C.F.R. pt. 727 applies to claims filed prior to April 1, 1980, while Part 718 applies to all claims filed after March 31, 1980 and may apply to claims filed prior to March 31, 1980, but adjudicated, at least in part, thereafter. *See Saginaw Mining Co. v. Ferda,* 879 F.2d 198, 204-05 (6th Cir. 1989).

even in part, out of coal mine employment; or 4) that he/she does not or did not have pneumoconiosis. The Supreme Court held that Section 727.203(a) requires that the claimant, in order to get the presumption, establish at least one of the qualifying facts by a preponderance of the evidence.[7] *Mullins*, 484 U.S. at 147-6].

In determining that the claimant must establish facts to satisfy the interim presumption by a preponderance of the evidence, the Court's decision would seem to cast some doubt on the validity of the true doubt rule because the true doubt rule gives the nod to the claimant even though the claimant has established his/her evidence only up to 50:50 ratio. However, the Supreme Court noted, seemingly with approval, that the Benefits Review Board " 'has consistently upheld the principle that, where true doubt exists, that doubt shall be resolved in favor of the claimant.' " *Mullins*, 484 U.S. at 144 n.12 (quoting *Lessar v. C.F. & I. Steel Corp.*, 3 Black Lung Rep. (MB) 1-63, 1-68 (Ben. Rev.. Bd. Mar. 31, 1981)). Furthermore, the Court quoted with approval the comments that accompanied the publication of the regulations in which the Secretary of Labor stated, " 'The [Black Lung Benefits] Act embodies the principle that doubt is to be resolved in favor of the claimant, and that principle plays an important role in claims determinations both under the interim

---

[7] In determining that the preponderance of the evidence standard applied to prove a fact which would invoke the interim presumption, the Court determined that the preponderance of the evidence standard was required by the regulation itself. The Court did not pass on whether Section 7(c) of the APA required a claimant to prove an invocation fact by a preponderance of the evidence. *Mullins*, 484 U.S. at 161 n.35.

presumption and otherwise.' " *Id.* at 156 n.29 (quoting 43 Fed. Reg. 36,826 (1978)).

While the Supreme Court did not say expressly and definitely that the true doubt rule remains valid in light of its holding that the preponderance of the evidence standard is to be applied before a claimant can get the interim presumption, the Court did not strike it down as invalid either. Despite the nebulous nature of the Court's opinion on that issue, the Seventh Circuit has stated, "the Court left the true doubt rule intact." *Freeman United Coal Mining Co. v. OWCP*, No. 92-1992, 1993 WL 56178, *4 (7th Cir. Mar. 4, 1993). In addition, after reviewing the Court's references to the true doubt rule in *Mullins*, the Seventh Circuit stated, "Far from casting doubt on the true doubt rule, the above language treats the rule as a reasonable interpretation of the regulations." *Id.*

In addition to concluding that the Supreme Court, in *Mullins*, kept the true doubt rule intact, the Seventh Circuit's decision in *Freeman* established the validity of the true doubt rule in Part 727 claims in relation to the APA. In *Freeman*, the employer argued that the "true doubt rule" violated Section 7(c) of the APA because the rule allows an ALJ to award black lung benefits to a claimant who has not proven his/her right to them by a preponderance of the evidence. In addition, the employer argued that the rule impermissibly lowered the standard of proof required by the APA.

The Seventh Circuit found both arguments to be without merit. First, the court noted that the burden of proof requirement in the APA is really a burden of going forward, not a burden of persuasion. *Id.* at *3 (citing

NLRB v. Transportation Management Corp., 462 U.S. 393, 404 (1983)); *but see Maher Terminals, Inc. v. Director, OWCP*, No. 92-3222, 1993 WL 116935, at *8-9 (3d Cir. April 19, 1993) (burden of proof requirement in the APA is both a burden of going forward and a burden of persuasion; to meet its burden of persuasion, the proponent of a sanction, rule or order must prove its case by a preponderance of the evidence). From that, the court concluded that the "true doubt rule does not alleviate the claimant's burden of going forward. Before a claimant can benefit from the rule, he must put in some evidence showing the presence of pneumoconiosis." *Freeman*, at *4.

Second, the court found that the true doubt rule does not lower the standard of proof required by the APA. The court noted that the APA has a preponderance of the evidence requirement. *Id.* (citing *Steadman v. SEC*, 450 U.S. 91, 100-01 (1981)). The court noted that the "burden of persuasion may be legislatively or judicially assigned to a specific party to establish a particular fact." *Id.* The court explained that in Part 727 claims:

> the true doubt rule allows an ALJ to invoke the presumption of disability in favor of a claimant once the claimant has produced prima facie evidence of pneumoconiosis that has not been overcome by the employer's opposing evidence. The employer then must persuade the ALJ that the claimant did not have pneumoconiosis.

Id. As a result, it found that the true doubt rule does not contravene Section 7(c), "for its application results in nothing more than a judicial assignment of the burden of persuasion to the employer." *Id.*

Although the Supreme Court in *Mullins* and the Seventh Circuit in *Freeman* dealt with Part 727, we find that the Seventh Circuit's reading of *Mullins* is persuasive, correct and applicable to Part 718 as well. Furthermore, for several reasons, we find that the true doubt rule in the Part 718 context can properly co-exist with the preponderance of the evidence standard mandated by the APA, the regulations, and case law.

First, the true doubt rule advances the goals of the Act. We note that "[t]he Act is remedial in nature, and it must be liberally construed to include the largest number of miners as benefit recipients." *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042 (6th Cir. 1993) (quoting *Southard v. Director, OWCP*, 732 F.2d 66, 71 (6th Cir. 1984)). As explained by the Seventh Circuit:

> [t]he true doubt rule is a judicial construct designed to effectuate Congress's intent that the Black Lung Benefits Act be liberally construed to ensure payment to deserving claimants. The rule derives from a Senate Report accompanying 1972 amendments to the black lung program which noted that the Act "is intended to be a remedial law. . . . In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors." S.Rep. No. 743, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2305, 2315. Congress reaffirmed its expressed intent that the benefit of any evidentiary doubt be given to the miner when it further amended the Act in 1977.

Freeman, 1993 WL 56178, at *2.[8]

---

[8] Because the true doubt rule is a judicial construct which sprang from a fundamental concern of Congress that there were

Second, we note that the APA's requirement of the preponderance of the evidence standard only goes to the

---

many coal miners who were being destroyed by black lung diseases, we find it important to refresh our collective memory to this problem. To that end, we cite to the legislative history of the 1972 amendments to the Federal Coal Mine Health and Safety Act, cited in *Morris v. Mathews*, 557 F.2d 563, 567-70 (6th Cir. 1977):

> BACKGROUND
>
> The Federal Coal Mine Health and Safety Act of 1969 recognized, for the first time in Federal legislation, the inadequacy of compensation to miners totally disabled by coal workers' pneumoconiosis, or, as it is commonly called, "black lung." As the Senate Report on the original Act stated, this irreversible disease was "believed to have afflicted 100,000 of the Nation's active and retired miners." President Nixon, in his March 1969 message which called for a new coal mine health and safety act, said, "Death in the mines can be as sudden as an explosion or a collapse of a roof and ribs, or it comes insidiously from pneumoconiosis, or black lung disease."
>
> At the time the Coal Mine Health and Safety Act was signed into law, only two and one-half years ago, it was generally thought that coal miners' occupational breathing disabilities were encompassed by the term "pneumoconiosis". Members of Congress, the knowledgeable press, and many physicians believed this to be the case. It was generally believed that title IV of the Act, relating to black lung benefits, would be a satisfactory means of compensating miners who were incapacitated by respirable diseases, as well as the surviving widows and children of miners who had died from the dread black lung.
>
> *Since the passage of that basic, necessary, desirable Act however, experience has taught us that all is not as we expected.* As of March 3, 1972, 356,857 claims had been

burden of production. *See Transportation Management*, 462 U.S. at 403 n. 7. As a result, a claimant's burden of production, and likewise, the APA's burden of production

---

filed since the effective date of the Act, December 30, 1969. According to the Social Security Administration 91,784 disabled miners and 74,809 widows have received benefits, for a total of 166,593 claims, while 169,999 claims have been denied.

Not only have the number of claims far exceeded those earlier expectations of Congress, indicating a more widespread and more serious problem than they anticipated, but also the rate of denials – more that fifty percent nationwide, and as high as 72 percent in some states – suggests strongly that the solution has not been nearly as complete as Congress believed and expected it would be.

. . . .

Existing law limits benefits to those whose claims are based on totally disabling pneumoconiosis, a progressive chronic dust disease of the lung. *Although title IV of the 1969 Act is couched in terms of pneumoconiosis, it has become glaringly apparent that the Act is not benefitting many of the nation's disabled coal miners who Congress intended to benefit. Testimony has indicated that miners with disabling breathing impairments who cannot be diagnosed medically as suffering from pneumoconiosis, because of the state of the art, are being denied benefits though they are as severely and often times more severely impaired than miners whose claims have been granted.*

The reasons for these denials are many. The great majority of denials are attributed to the inability of the miner to present X-ray evidence of the disease. Some have been denied because the simple breathing test, which measures only ventilatory capacity, may not adequately detect disabling respiratory or pulmonary impairment. Some have been denied because of the failure to recognize the special problems encountered by disabled miners in obtaining gainful employment outside of coal mining in Appalachia.

requirement, are satisfied by producing evidence which would show the presence of pneumoconiosis. *Freeman,*

Over a hundred years ago, Emile Zola wrote his nonmedical description of the coal miner in *Germinal*:

> "Have you been working long at the mine?"
>
> He flung open both arms.
>
> "Long? I should think so. I was not eight when I went down and I am fifty eight. They tell me to rest, but I'm not going to; I'm not such a fool. I can get on for two years longer, to my sixtieth, so as to get the pension."
>
> A spasm of coughing interrupted him again.
>
> "I never used to cough; now I can't get rid of it. And the queer thing is that I spit."
>
> The rasping was again heard in his throat, followed by a black expectoration.
>
> "Is it blood?"
>
> He slowly wiped his mouth with the back of his hand.
>
> "No, it's coal. I've got enough in my carcass to warm me till I die. And it's five years since I put a foot down below. I stored it up, it seems, without knowing it."

Suffice it to say that this miner's widow, were she alive today, would have great difficulty in obtaining benefits.

The reality of this projection have been borne out by the rate of denials to black lung claimants and their widows. In some states as many as 70 percent of the applicants have been turned down. The national average is a 50 percent denial rate.

Congress intended, through the 1969 Act, to recompense the disabled miner for his mine-related disease. It was believed that title IV would provide benefits to those who were so disabled.

Congress recognized when the Act was being considered, however, that the chest X-ray, or

1993 WL 56178, at *4. Therefore, the APA is not violated by the true doubt rule because the rule does not disturb

---

roentgenogram, was an imperfect means of ascertaining the existence of pneumoconiosis in coal miners. Testimony to that effect was provided by the Surgeon General, who produced a Public Health Service study showing the the [sic] existence of pneumoconiosis from autopsies performed on deceased coal miners who had, while living, been diagnosed by a means of X-ray examination to be free from pneumoconiosis. For this reason the Senate Committee report on the 1969 Act specifically referred to the need to require medical tests other than the X-ray to "establish the extent and severity of the disease." Many cases have come to the Committee's attention in which a minor [sic] is suffering from a severely disabling respiratory or pulmonary impairment, and yet he has no X-ray evidence of pneumoconiosis.

Because of the continuing recognition of the fact that X-ray evidence is not always satisfactory, the Committee retained a provision of the House bill which prohibits the denial of a claim solely on the basis of the results of a chest roentgenogram. It was anticipated by Congress in 1969 that other tests to establish pneumoconiosis would be developed through research. This has not been done, and the Social Security Administration continues to rely exclusively on the results of X-ray evidence.

Testimony has further indicated that a negative X-ray is not proof positive of the absence of pneumoconiosis. Studies in addition to that of the Public Health Service confirm the existence of the disease by autopsy where a chest X-ray was negative, indicating an error of 25 percent in diagnosis.

. . . .

Other testimony indicates that an X-ray may often be clouded by the presence of emphysema so that pneumoconiosis does not show on the X-ray. In some cases it

the claimant's burden of producing evidence which shows the existence of pneumoconiosis. *Id.*

Third, because the regulations follow the APA, the regulations would comport with the APA by assigning the burden of production to the claimant. Section 718.403 does that. As a result, the true doubt rule does not violate Section 718.403, at least to the extent that it follows the APA requirements. However, Section 718.403 also assigns the burden of persuasion to the claimant. As the Seventh

---

has been alleged that the X-ray was of poor quality, and for that reason did not show the existence of black lung.

Senator Robert C. Byrd, in testimony before the Subcommittee on Labor on the pending black lung benefits legislation, spoke eloquently of this urgent problem. He said:

"Let us stop quibbling with dying men as to whether their lungs are riddled with black lung or whether they are affected with asthma, or silicosis, or chronic bronchitis."

. . . .

[Congress, in enacting the Black Lung Benefits Act of 1972, stated:]

The Black Lung Benefits Act of 1972 is intended to be a remedial law – to improve upon the 1969 provisions so that the cases which should be compensated, will be compensated. In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors.

. . . .

S.Rep. No. 92-743, 92d Cong., 2d Sess. (1972); 1972 U.S. Code Cong. & Ad. News pp. 2305-07, 2312-15. (Emphasis added.)

Id. (emphasis in original).

Circuit notes, "the burden of persuasion may be legislatively or judicially assigned to a specific party to establish a particular fact." *Freeman*, 1993 WL 56178, at *4 (citing *Transportation Management*, 462 U.S. at 403 n.7; *Alabama By-Prods. Corp. v. Killingsworth*, 733 F.2d 1511, 1514 (11th Cir. 1984)). Although the burden of persuasion is assigned to the claimant, the true doubt rule does not run afoul of the burden of persuasion requirement of Section 718.403 because the regulations themselves allow that all reasonable doubts should be decided in favor of the claimant. Section 718.3(c) (1992) commands that claimants be given the benefit of all reasonable doubts:

> In enacting Title IV of the Act, Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. However, no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.

Fourth, we note, as the Supreme Court did with Part 727 in *Mullins*, that the BRB has consistently utilized the true doubt rule in Section 718 claims where there was equally probative, but conflicting X-ray evidence as a way to follow the general mandate of the Act. *See, e.g., Wilt v. Wolverine Mining Co.*, 14 Black Lung Rep. (MB) 1-70, 1-76 (Ben. Rev. Bd. June 29, 1990); *Clark v. Karst-Robbins Coal Co.*, 12 Black Lung Rep. (MB) 1-149, 1-153 to 1-154 (Ben. Rev. Bd. Apr. 28, 1989).

Fifth, we note that various circuits have permitted the use of the true doubt rule in Section 718 cases. *See, e.g., Adkins v. Director, OWCP,* 958 F.2d 49, 52 n.4 (4th Cir. 1992) ("Equally probative evidence creates a 'true doubt,' which must be resolved in favor of the miner."); *Hansen v. Director, OWCP,* 984 F.2d 364, 369 (10th Cir. 1993) (" 'true doubt' rule applies where equally probative but contradictory medical documentation exists"); *but see Greenwich Collieries v. Director, OWCP,* No. 92-3270, 1993 WL 79413, at *7 (3d Cir. Mar. 23, 1993) (the true doubt rule "contravenes *Mullins,*" and "is contrary to Supreme Court precedent, the regulations under the Act, and the APA because: (1) the claimant bears the ultimate burden of persuasion on the ultimate facts entitling him to benefits under the Act; (2) the APA and the Supreme Court have defined the ultimate burden of persuasion as a preponderance of the evidence; and (3) the true doubt rule would allow a claimant to prevail despite failing to prove entitlement by a preponderance of the evidence"). This circuit has also willingly permitted the use of the true doubt rule. *See, e.g., Reynolds v. Director, OWCP,* No. 89-3431, 1990 U.S. App. LEXIS 10898, at *7 (6th Cir. June 27, 1990) ("If the ALJ finds that contrary interpretations of the same X ray by two B-readers are of equal probative value, the benefit of the doubt shall be resolved in the claimant's favor.").

While Section 718.403 places the burden of proving pneumoconiosis by the preponderance of the evidence on the claimant, the overarching concern and goal of the Black Lung Benefits Act, which requires that doubts be resolved in favor of the claimant, leads us to hold that the APA and Section 718.403 are not violated when the true

doubt rule is utilized to have equally probative but conflicting evidence weighed in favor of the claimant.

C.

Notwithstanding the validity of the true doubt rule, Consolidation argues that the rule is inapplicable to this case because the evidence which shows the existence of pneumoconiosis is not equally probative but conflicting.

We find that this is a case where the evidence is equally probative but conflicting – several B-readers[9] and/or Board-Certified Radiologists found pneumoconiosis; others did not. Of the more recent X rays, there was also a conflict between negative and positive readings. The ALJ considered the conflicting X-ray evidence and the qualifications of the physicians interpreting the X rays, accorded greater weight to the most recent X-ray evidence, and permissibly found that true doubt existed on the issue of the existence of pneumoconiosis. The ALJ then resolved the issue in favor of Skukan. Substantial evidence supports the ALJ's decision to resolve the issue in favor of Skukan.

---

[9] " ' "B" readers are radiologists who have demonstrated their proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health & Human Services.' " *Mullins*, 484 U.S. at 145 (quoting *Consolidation Coal Co. v. Chubb*, 741 F.2d 968, 971 n.2 (7th Cir. 1984)).

D.

Consolidation also requests that this court remand this matter to the BRB for consideration of Consolidation's argument that the ALJ erred in weighing the evidence concerning the existence of a disabling pulmonary impairment under Section 718.204(c). Consolidation raised this argument before the BRB; however, the BRB did not address this issue because it ultimately found in favor of Consolidation.

We find that it would be useless to remand this issue to the BRB for it to discuss the ALJ's weighing of Skukan's pulmonary impairment. Based on our review of the record, substantial evidence supports the ALJ's finding that Skukan had a disabling pulmonary impairment. As noted by the ALJ, there is overwhelming evidence that Skukan is totally disabled based on Section 718.204(c)(4). Several doctors – Connelly and Levine in particular – diagnosed that, in their reasoned judgment and based on their analyses of the required tests and examinations, Skukan suffers from a totally disabling respiratory impairment.

V.

For the foregoing reasons, we reverse the BRB's decision and order that benefits be awarded to Skukan. In addition, we find that the true doubt rule is not violative of the regulations or the APA.

U.S. Department of Labor

Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

NOT-PUBLISHED
(Seal)

BRB No. 88-3148 BLA
and 88-3148 BLA-A
OWCP No. 276-22-7116

JOSEPH J. SKUKAN Claimant-Petitioner Cross-Respondent v. CONSOLIDATION COAL COMPANY Employer-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	DATE ISSUED: FEB -3 1992 DECISION and ORDER

Appeal of the Decision and Order of Administrative Law Judge Michael P. Lesniak, United States Department of Labor.

Timothy F. Cogan (O'Brien, Cassidy & Gallagher, L.C.), Wheeling, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals

Judge, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (84-BLA-9890) of Administrative Law Judge Michael P. Lesniak denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The administrative law judge found that claimant established twenty-nine years of coal mine employment, and, based on the filing date, applied the regulations found at 20 C.F.R. Part 718. The administrative law judge found that claimant had established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§ 718.202(a)(1), 718.203, but found the evidence insufficient to establish the existence of total disability due to pneumoconiosis pursuant to 20 C.F.R. § 718.204(b). Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in finding that total disability due to pneumoconiosis was not established; in denying his Motion for Reconsideration, and erred in ordering claimant to undergo a second physical examination. Employer responds and files a cross-appeal, contending that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(1), and urging that the remaining Decision and Order be

---

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5)(Supp. V 1987).

affirmed. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b) (3), as incorporated by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§ 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement. *See Trent, supra.*

On appeal, claimant contends that the administrative law judge erred in failing to find the evidence sufficient to establish total disability due to pneumoconiosis. Specifically, claimant contends that the administrative law judge erred in failing to accord the medical opinions of Drs. Levine and Connelly greater weight. The record contains eight physicians' opinions. The administrative law judge permissibly gave less weight to Dr. Levine's report, which found claimant totally disabled due to coal dust exposure, because he failed to account for claimant's smoking history. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Claimant's Exhibit 12. The administrative law

judge also permissibly found that the medical opinion of Dr. Connelly, who found that claimant's years of coal mine employment rendered him totally and permanently disabled, was outweighed by the well-reasoned reports of Drs. Altmeyer and Morgan, who both found no impairment. *See Fields, supra; Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller, supra;* Claimant's Exhibit 23; Director's Exhibit 29; Employer's Exhibits 7, 8; Decision and Order at 12. Contrary to claimant's contention, the administrative law judge is not required to accord greater weight to Dr. Reyes' opinion because he is claimant's regular treating physician, nor did the administrative law judge err in according greater weight to the opinion of Dr. Altmeyer, a non-treating physician. *See Halsey v. Richardson*, 441 F.2d 1230 (6th Cir. 1971); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Cadwallader v. Director, OWCP*, 7 BLR 1-879 (1985). Furthermore, the administrative law judge permissibly did not credit the reports of Drs. Delvecchio, Reyes and Tipton, as well as the lay testimony of record, as these opinions are not probative on the issue of total disability due to pneumoconiosis. *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Director's Exhibit 10. Claimant's Exhibits 7, 8. Finally, it is within the administrative law judge's discretion to order a second physical examination of claimant. *See* 20 C.F.R. § 725.414(a); *Blackstone v. Clinchfield Coal Co.*, 10 BLR 1-27 (1987). We therefore affirm the administrative law judge's weighing of the medical reports and his subsequent finding that the medical evidence is insufficient to establish total disability due to pneumoconiosis. Because claimant has failed to establish total disability due to pneumoconiosis, an essential element of entitlement, we affirm

the administrative law judge's denial of benefits. *See Trent, supra; Perry, supra.*[1]

In its cross-appeal, employer contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The administrative law judge considered the conflicting x-ray evidence, accorded greater weight to the most recent x-ray evidence, and permissibly found that true doubt existed on the issue of the existence of pneumoconiosis. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983); Decision and Order at 6. The administrative law judge then permissibly resolved the issue in favor of claimant. *See Conley v. Roberts and Schaefer Co.*, 7 BLR 1-309 (1984); *see also Wilt, supra.* Accordingly, employer's contention of error on this issue is rejected and the administrative law judge's finding on this issue is affirmed.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

/s/ Betty J. Stage
BETTY J. STAGE, Chief
Administrative Appeals
Judge

---

[1] Claimant's contention that the administrative law judge erred in denying his Motion for Reconsideration is without merit. Because this claim was filed after the 1982, the presumption found at 20 C.F.R. § 718.305 is unavailable to claimant. *See* Section 411(c)(4) of the Act, 30 U.S.C. § 921(c)(4).

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals
Judge

/s/ Reno E. Bonfanti
RENO E. BONFANTI
Administrative Law Judge

U.S. Department of Labor [LOGO]

Office of Administrative Law Judges
Suite 201
55 West Queens Way
Hampton, Virginia 23669
804-722-0571

In the Matter of:

JOSEPH J. SKUKAN,
Claimant,

v.

CONSOLIDATION COAL COMPANY,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

DATE ISSUED:
JUL 25 1988

CASE NO.:
84-BLA-9890

OWCP NO.:
CO 276-22-7116- LM

Appearances:

Timothy F. Cogan, Esq.
For the Claimant

William S. Mattingly, Esq.
For the Employer

Before: MICHAEL P. LESNIAK
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This case arises from a claim for federal benefits under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* ("ACT"), and applicable federal regulations, mainly 20 C.F.R. Parts 410, 718, and 727 ("Regulations").

The Act and Regulations provide compensation and other benefits to: (1) living coal miners who are totally disabled due to pneumoconiosis and their dependents; (2) surviving dependents of coal miners whose death was due to pneumoconiosis; and (3) surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death (for claims filed prior to January 1, 1982). (See also Sections 718.306 and 727.204 for entitlement presumptions in certain rare death claims filed before April 30, 1982, where the miner was only partially disabled at death). Other benefits include necessary medical and hospitalization costs required for the treatment of pneumoconiosis. The Act and Regulations define pneumoconiosis ("black lung disease" or "CWP") as a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. See § 718.201.

A formal hearing was conducted in Wheeling, West Virginia on June 4, 1987, at which all parties were afforded a full opportunity to present evidence and argument, as provided in the Act and the Regulations issued thereunder, found in Title 20, Code of Federal Regulations, Parts 725 and 727.

ISSUES

The contested issues are:

(1) Whether the Claimant has pneumoconiosis;

(2) Whether the Claimant's pneumoconiosis arose out of his coal mine employment;

(3) Whether the Claimant is totally disabled; and

(4) Whether the Claimant's disability is due to pneumoconiosis (DX 30; TR 24).[1]

Preliminary Matters

I allowed the parties additional time to rebut CX 22 and EX 7 (TR 54). Claimant submitted CX 23 post hearing and it is admitted into evidence. Employer submitted EX 8 and EX 9 which are also admitted into evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Coal Miner

The Claimant was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the Regulations for at least 29 years (*See* Stipulation of Parties at TR 23).[2]

---

[1] The following abbreviations will be used as citations to the record:

ALJX - Administrative Law Judge's Exhibits;
EX - Employer's Exhibits;
DX - Director's Exhibits;
CX - Claimant's Exhibits; and,
TR - Transcript of the hearing.

[2] Since the miner has testified to 37 years of coal mine employment and the Employer has shown no evidence to the

Date of Filing

The Claimant filed his claim for benefits under the Act on February 9, 1983 (DX 1; TR 23). None of the Act's filing time limitations are applicable, thus the claim was timely filed.

Responsible Operator

Consolidation Coal Company is the last Employer for whom the Claimant worked a cumulative period of at least one year and is a properly designated responsible coal mine operator in this case under Subpart F of Part 725 of the Regulations (*See* Stipulation at TR 23).

Dependents

The Claimant has one dependent for purposes of augmentation of benefits under the Act, his wife Ruth Marie (TR 23).

Background and Employment History

The Claimant is Joseph J. Skukan, 69426 Providence Road, Clairsville, Ohio, 43950, and he testified that he was 59 years old. He has an eighth grade education and he was a coal miner for 37 years, all but about two years being underground. This was a general laborer's classification and as a general laborer he had to set timbers, post in air courses, move machinery around and walk

---

contrary, I find 37 years to be his coal mine employment (*See* TR 32).

anywhere from one half to one mile per day. The timbers weighed 90 pounds per foot and were approximately 15 feet long. He assisted several other men carrying these timbers from the flat cars to where they would be used. Prior to general labor work, he operated a continuous miner for ten years. As a continuous miner operator, and before that a roof bolter, the dust in his environment was very bad (TR 28).

Claimant stopped working when he was 55 years of age because "he couldn't breathe" (TR 29). He was laid off, but stated that he could not breathe. He was short of breath.

Claimant testified that he smokes one pack of cigarettes per day. He last worked January 3, 1983.[3] On cross-examination, Claimant testified that he began smoking cigarettes when he was 18 or 19 years of age.

Pneumoconiosis and Total Disability

The miner's application for benefits was filed with the Department of Labor on February 9, 1983, and thus is governed by the permanent Regulations found in 20 C.F.R. § 718, which became effective on March 31, 1980. Under the new Regulations, the presence of pneumoconiosis is established separately from total disability.

Pneumoconiosis

Section 718.202 provides that the existence of pneumoconiosis can be established by x-ray, autopsy, or

---

[3] Employer stipulated that this statement is correct (TR 31).

biopsy; by the presumptions contained in §§ 718.304, 718.305, or 718.306; or by the report of a physician exercising sound medical judgment stating that the Claimant suffers from pneumoconiosis.

X-Ray Reports

Section 718.202(a)(1) provides that the presence of pneumoconiosis may be established by x-ray. The x-ray must be read to show pneumoconiosis, Category 1, 2, 3, A, B, or C, according to the ILO/UICC Classification System. The following x-ray reports appear in the record:

EXHIBIT NUMBER	DATE OF X-RAY	DATE OF REPORT	PHYSICIAN/ QUALIFICATIONS[4]	DIAGNOSIS
EX 2	6/10/71	4/7/87	Morgan, B	0/0
EX 1	6/10/71	4/15/87	Lapp, B	0/1, t, 2 zones
EX 2	12/13/74	4/7/87	Morgan, B	0/0
EX 1	12/13/74	4/15/87	Lapp, B	0/1, t, 2 zones
DX 13	3/10/83	3/10/83	Stupar, BCR	0/1, s, t, 3 zones
DX 12	3/10/83	5/3/83	Sargent, B	0/0
CX 10	3/10/83	3/25/87	Fisher, BCR, B	2/1, p, 6 zones
DX 22	2/1/84	2/1/84	Kennard, -	1/1, p, q

[4] The following abbreviations will be used in describing the qualifications of the physicians:

BCR - Board-Certified Radiologist;

B - B-Reader;

A - A-Reader; and

--- - Reader's qualifications unknown, not part of the record.

DX 25	2/1/84	5/12/84	Gordonson, BCR, B	0/1, t, 4 zones
DX 29	8/15/84	8/15/84	Altmeyer, B	0/0
EX 4	8/15/84	4/24/87	Wershba, BCR, B	0/0
EX 3	8/15/84	4/28/87	Gogineni, BCR, B	0/0
CX 21	8/15/84	5/6/87	Fisher, BCR, B	3/2, p, 5 zones
CX 3	5/9/86	12/23/86	Hodous, -	1/0
EX 2	5/9/86	4/7/87	Morgan, B	0/1, q, 4 zones
EX 1	5/9/86	4/15/87	Lapp, B	0/1, t, 2 zones
CX 11	10/30/86	10/30/86	Kennard, -	1/0, q., p, 4 zones
CX 12	4/3/87	4/3/87	Levine	1/2, p, s, 6 zones
CX 14	4/3/87	4/3/87	Zuck, BCR	1/2, p, 6 zones
EX 6	4/3/87	5/13/87	Binns, BCR, B	0/1, p, 6 zones
EX 7	5/13/87	5/14/87	Altmeyer, B	0/1, p, 3 zones

Where two or more x-ray reports are in conflict, the radiological qualifications of the physicians interpreting the x-rays must be considered (§ 718.202(a)(1)).

Of the 21 chest x-ray interpretations, 13 interpretations are by either B-Readers, Board-Certified Radiologists or both. Since pneumoconiosis is a progressive disease, I give the greatest weight to the most recent x-rays. Three physicians who are either Board Certified Radiologists, B-Readers, or both, interpreted a chest x-ray

taken in the year of 1987. They are doctors Zuck (CX 14), Binns (EX 6), and Altmeyer (EX 7).

Dr. Zuck interpreted the chest x-ray film of April 3, 1987 as 1/2, p in 6 zones; Dr. Binns interpreted this same film as 0/1, p 6 zones; and Dr. Altmeyer interpreted a film taken May 13, 1987 as 0/1, p, 3 zones.

On this record, I have a true doubt as to whether the Claimant has pneumoconiosis and, giving the benefit of the doubt to the Claimant, I find that the Claimant has established the presence of pneumoconiosis based upon chest x-ray evidence.

Evidence of Total Disability

Total disability is defined as pneumoconiosis which prevents or prevented the Claimant from performing his usual coal mine employment or other gainful work (§§ 718.305(c), 718.204(b)). Section 718.204 sets out standards for determining total disability. This section provides that in the absence of contrary probative evidence, evidence which meets the standards of either §§ 718.204(c)(1), (c)(2), (c)(3), (c)(4), or (c)(5) of the section shall establish the miner's total disability.

Pulmonary Function Tests

The Claimant may show that he is totally disabled by evidence which meets the standards of § 718.204(c)(1), standards involving pulmonary function tests. Claimant conceded that, prior to the submission of CX 22, there were no qualifying vent study results in the record (TR 38).

In reviewing CX 22, assuming the Claimant to be 5'8" tall and 56 years of age, the results of FVC, FEV1 and MVV and the numbers recorded are higher than those listed in the tables and the regulations.

Thus, the Claimant has failed to show that he is totally disabled based upon pulmonary function tests.

Arterial Blood Gas Tests

The Claimant may also show that he is totally disabled by evidence which meets the standards of § 718.204(c)(2), standards involving arterial blood gas tests. Claimant conceded that, with the exception of the results at CX 22, there are no qualifying blood gas study results in the record. In reviewing CX 22, I find that the results are nonqualifying when comparing the standards set out in the tables and the regulations. Thus, the Claimant has failed to show that he is totally disabled based upon blood gas tests.

Cor Pulmonale

There is no evidence that the Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, total disability is *not* established under § 718.204(c)(3).

Medical Reports

Subsection 718.204(c)(4) provides that total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that the

Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or in comparable and gainful employment.

The first medical report in the record appears at DX 10, report of Dr. DelVecchio dated April 5, 1983. On this occasion, the Claimant complained of cough bringing up approximately 2 tablespoons of yellow sputum, wheezing on exertion, and dyspnea. On physical examination of the thorax and lungs, Dr. DelVecchio noted upon inspection of the chest a normal contour. There was no wheezing and he found normal resonance and breath sounds. EKG showed possible coronary artery disease. X-ray showed pneumoconiosis 0/1 with s and t size densities. Blood gases were within normal limits and pulmonary function studies were within normal limits.

Dr. DelVecchio diagnosed pneumoconiosis, mild to moderate due to exposure to coal dust.[5] Dr. DelVecchio's diagnosis also included the finding of bronchitis with cough in the morning, wheezing on exertion, cigarette smoking, one pack, for 28 years, possible evidence of coronary artery disease, normal blood gas studies and vent studies. He failed to indicate whether the Claimant was totally disabled.

The next report appears at DX 29, report of Dr. Altmeyer dated August 27, 1984. Dr. Altmeyer took a complete work and health history from the Claimant. Physical examination was unremarkable. An exercise

---

[5] This contradicts Dr. DelVecchio's x-ray finding of 0/1 which represents a negative finding, although it is possible that the finding of 0/1 was actually a typographical error.

blood gas study was not performed; however, resting arterial blood gases showed minimal degree of hypoxemia at rest and a normal PH and PC02. Routine spirometry was normal except for borderline low peak flow. A chest x-ray was negative. Dr. Altmeyer diagnosed chronic bronchitis by history without airway obstruction, hypertension, and left axis deviation by EKG. Dr. Altmeyer opined that the Claimant did not have pneumoconiosis although his cough and sputum production were sufficient to meet the criteria for clinical diagnosis of chronic bronchitis. It was his opinion that Claimant's respiratory impairment was not significant and that he could return to his prior job as a coal miner. Dr. Altmeyer's report appears to be well reasoned.

DX 5 is a letter from Dr. Reyes dated August 14, 1986. Dr. Reyes is the Claimant's family physician. By his letter, Dr. Reyes "certified" that the Claimant was known to have emphysema, chronic obstructive pulmonary disease, and black lung. Dr. Reyes said he knew the Claimant for 10 years and knew that he worked as a coal miner for 37 years. Claimant had exertional dyspnea and had breathing treatments in the past.

CX 6 is a report dated January 25, 1983 by Dr. Reyes. Claimant said he had been getting short winded and he complained of a nagging cough with yellowish mucus expectorations every day. On examination, Claimant's vital signs were within normal limits, there was increased chest AP diameter, and breath sounds were diminished with occasional bronchial wheezing bilaterally. Dr. Reyes attached a chest x-ray report from Dr. Aceto dated September 2, 1976 to his report. This chest x-ray report

indicated "there may be minimal changes of pneumoconiosis". Dr. Reyes diagnosed mild emphysema and chronic obstructive lung disease with chronic bronchitis. He then stated that Claimant's pneumoconosis was related to his being a coal miner for over 30 years. Dr. Reyes did not state whether the Claimant is disabled.

CX 8 is a report by Dr. Tipton dated October 29, 1986. On physical examination, there were rather diffuse, mostly sonorous, expiratory rhonchi. There was generalized decrease in breath sounds throughout the lungs fields. Dr. Tipton said that the chest x-ray performed by the Department of Health and Human Services in June of 1986 showed increased interstitial markings and they recommended a follow-up x-ray. Pulmonary function studies demonstrated the FEVl to be 87% of predicted and the FVC to be 108% of predicted. It was felt that Claimant had mild obstruction of air flow. Dr. Tipton did not indicate whether the Claimant was disabled due to pneumoconiosis.

The next report is at CX 12, report of Dr. Levine dated April 3, 1987. Dr. Levine is Board-Certified in internal medicine and certified in the subspeciality of allergy (CX 13). Dr. Levine took an occupational and medical history from the Claimant who complained of breathing problems for the past ten years. Physical examination showed that the chest was symmetrical with fair expansion and a slight increase in resonance. There were clear breath sounds. Dr. Levine found no ankle edema and no clubbing.

Claimant walked over a one step stool 20 times in 70 seconds. At the last 15 seconds, Claimant became short of

breath. The heavy breathing persisted for two minutes. Pulmonary function studies were normal and chest x-ray showed pneumoconiosis, 1/2 type p and s in 6 zones. Dr. Levine diagnosed pneumoconiosis due to coal dust, chronic bronchitis and mild obesity. He stated that the Claimant was totally and permanently disabled due to pneumoconiosis due to coal dust. He stated further that the Claimant was short of breath on minor exertion and this was supported by the exercise tolerance test. Normal pulmonary function studies were not considered to be unusual with the Claimant's type of condition. Dr. Levine failed to state what effect Claimant's 41 pack years of cigarette smoking had on his condition.

The next report is at CX 2, report of Dr. Garson dated June 3, 1987. Dr. Garson reviewed Dr. Altmeyer's diagnostic studies, specifically pulmonary function studies and blood gas studies of August of 1984. Dr. Garson stated that while Dr. Altmeyer's pulmonary function testing figures seem reliable and valid, he did not agree with Dr. Altmeyer's interpretation with the exception of the normal diffusing capacity. In Dr. Garson's opinion, the pulmonary function studies showed moderate obstructive lung defect. With regard to the blood gas studies, the resting arterial blood gas studies were abnormal. To reduce personal bias in the interpretation of the figures, Dr. Garson submitted them to, "our computer which evaluates such figures by the best American Thoracic Society data." The computer readout agreed with Dr. Garson's interpretation and not Dr. Altmeyer's.

The final report submitted by the Claimant is at CX 23, report of Dr. Connelly dated June 17, 1987. Dr. Connelly took a complete work and individual health history

from the Claimant. Claimant started [sic] he started smoking at the age of 18 and smoked a pack of cigarettes per day. On physical examination, Claimant's chest expanded fairly well, although he used accessory muscles of respiration for deep inspiration. Breath sounds were coarse throughout and an occasional rhonchi was heard. The remainder of the physical examination was unremarkable. A chest x-ray showed pneumoconiosis 1/2 type p. Vent studies were normal.

Because of the Claimant's history and physical examination and clinical findings, Dr. Connelly diagnosed coal workers' pneumoconiosis which rendered the Claimant totally disabled. The coal workers' pneumoconiosis was caused by the Claimant's exposure to coal dust.

The next report appears at EX 5, report of Dr. Morgan dated May 4, 1987. Dr. Morgan did not examine the Claimant but instead reviewed various reports of physicians who either examined the Claimant or conducted various diagnostic studies prior to May 14, 1987.

In his report, Dr. Morgan summarized the medical reports and/or findings and concluded that the Claimant had either normal or near normal spirometry. At certain instances the values were on the low side of normal and in others they were minimally abnormal. Even if one accepted the lower values, the degree of obstruction was minimal, in Dr. Morgan's opinion. In summary, Dr. Morgan did not believe that there was any significant disabling pulmonary impairment.

With regard to whether the Claimant had pneumoconiosis, it was Dr. Morgan's opinion that he did not. He based his opinions on the chest x-rays taken by Drs.

Sargent, Gordonson, Lapp and Altmeyer. It was clear, however, that the Claimant had a few scanty irregular opacities in the lower zones which were frequently seen in subjects who were smokers. Dr. Morgan did not believe that the Claimant was totally and permanently disabled on account of his respiratory disease. His hypoxemia could be attributed to obesity and cigarette smoking.

The next report is at EX 7, report of Dr. Altmeyer dated May 14, 1987. Dr. Altmeyer is Board-Certified in Internal Medicine and is a certified "B-Reader" by the National Institute of Occupational Safety and Health.

Dr. Altmeyer previously examined the Claimant in 1984 and reviewed the Claimant's occupational history with the Claimant, who complained of shortness of breath after walking two blocks on flat ground or after climbing 15 steps. Claimant said he used two pillows to sleep on and coughs every morning, productive of phlegm. He wheezed in bed at night and had lower sternal chest pain which occurred with exertion. Dr. Altmeyer took a smoking and individual health history from the Claimant. Physical examination was unremarkable. Vent studies were within normal limits and arterial blood gases (resting) revealed minimal hyperventilation which Dr. Altmeyer felt was normal for the Claimant's age. EKG was thought to be abnormal, chest x-ray showed 0/1, type p, which Dr. Altmeyer interpreted as negative for pneumoconiosis. There were no large or small opacities to suggest the presence of pneumoconiosis. Dr. Altmeyer diagnosed chronic bronchitis, hypertension, left axis deviation by EKG, possible angina

pectoris by history with exertional chest pain and possible remote true posterior wall myocardial infarction.

Dr. Altmeyer did not believe the Claimant had pneumoconiosis although he felt that a diagnosis of clinical chronic bronchitis was warranted. In his opinion, the chronic bronchitis was caused by Claimant's chronic cigarette smoking. Dr. Altmeyer's report seems well reasoned.

Dr. Altmeyer's deposition was taken on August 17, 1987 (EX 8). His testimony on direct is consistent with his two medical reports. I note that on cross-examination Dr. Altmeyer testified that it was possible to have coal workers' pneumoconiosis and have normal chest x-rays (EX 8, p. 29 and 30). It is not true that every individual with simple coal workers' pneumoconiosis has airway obstruction associated with it (EX 8, p. 46). He agreed with the statement that coal workers' pneumoconiosis produced a gradual reduction of ventilatory capacity which is a slow decrease throughout many years (EX 8, p. 46). He did not believe that the Claimant was impaired enough to be unable to perform his last job as a general laborer. This would require a moderate degree of airway obstruction (EX 8, p. 47). With regard to blood gases, in 1984 the PAC02 was normal but the PA02 was below normal. In 1987 the PAC02 was fairly abnormal (EX 8, p. 48).

Dr. Altmeyer has examined coal miners at the request of numerous coal companies. Since 1981, Dr. Altmeyer estimated that he has been involved in 300 to 600 worker's compensation cases in the black lung area and

he charged anywhere from $450.00 to $500.00 for a complete pulmonary examination. He did not believe that he has ever testified on behalf of coal miners in a federal black lung case (EX 8, pp. 55 through 59).[6]

EX 9 is the deposition transcript of Dr. Connelly taken September 2, 1987. Dr. Connelly's report is in the record as CX 23. Dr. Connelly testified that he considers the Claimant's smoking history of 42 years to be significant (EX 9, p. 10). Dr. Connelly's physical examination alone did not give him any indication that the Claimant suffers from a severe lung disorder (EX 9, p. 11). The physical examination, however, did give Dr. Connelly an indication that the Claimant was having some difficulty with his chest and breathing. Considering the Claimant's height and weight (5'10", 201 pounds), Dr. Connelly considered the Claimant to be overweight. Claimant's chest x-ray was interpreted by Dr. Zuck as 1/2, p, in 6 lung fields. Dr. Zuck is a Board-Certified Radiologist (EX 9, p. 13). In Dr. Connelly's opinion, Claimant's long cigarette smoking history would produce some of his symptoms. However, his primary disability is due to pneumoconiosis. The smoking history is significant and it would contribute to Claimant's coughing and production of mucous and some to Claimant's shortness of breath (EX 9, p. 26). In Dr. Connelly's opinion, Claimant's 37

---

[6] Employer's objections during this inquiry (pages 55 through 59 of EX 8) are overruled. Claimant's counsel is permitted wide latitude on cross-examination and questions of this sort are proper to expose a witness' bias.

years of coal mining and dust exposure is a more significant factor and a predominant cause for the Claimant's disability (EX 9, p. 27).

On cross-examination, Dr. Connelly testified that the hypoxemia detected by Dr. Altmeyer was not very marked and he would classify that the same way as the pulmonary function tests and those two factors would not give him a definite indication that the Claimant was disabled (EX 9, p. 31).

Summary of Medical Reports and Opinions

In summary, Dr. DelVecchio diagnosed chronic bronchitis and gave no disability evaluation. Dr. Altmeyer diagnosed chronic bronchitis and mild hypoxemia at rest and did not believe the Claimant was disabled. Dr. Reyes diagnosed mild emphysema, chronic obstructive lung disease and chronic bronchitis and gave no disability evaluation. Dr. Tipton diagnosed chronic obstructive pulmonary disease and gave no disability evaluation. Dr. Levine found pneumoconiosis and normal ventilatory studies, but failed to take blood gas studies, although Claimant's exercise tolerance test was abnormal. He believed the Claimant was totally disabled due to coal dust exposure but did not discuss Claimant's long history of cigarette smoking to my satisfaction. Dr. Garson reviewed Dr. Altmeyer's blood gas studies and ventilatory studies and did not agree with Dr. Altmeyer's interpretation. Dr. Connelly felt that the Claimant had pneumoconiosis. He relied upon a Board-Certified Radiologist who found pneumoconiosis and I feel in combination with his deposition and testimony, he took into

account Claimant's long history of cigarette smoking. Dr. Morgan reviewed various medical reports and opinions of other physicians and found that the Claimant did not have a significant respiratory impairment.

Based upon the overwhelming evidence in my view, Claimant is in fact disabled due to a respiratory condition and certainly cannot return to work as a coal miner. However, I find that he has failed to show a nexus between his pneumoconiosis and his respiratory impairment. Proof that a miner suffers from a totally disabling respiratory or pulmonary impairment as defined in § 718.204(c)(4) shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis (*See* § 718.204(c)(5)).

Claimant's most favorable evidence are the opinions of Drs. Levine and Connelly. Dr. Levine fails to take into account Claimant's long history of cigarette smoking and I give his report less weight than the opinion of Dr. Connelly. Dr. Connelly's opinion is outweighed by the opinions of Dr. Altmeyer and Dr. Morgan since those two physicians' opinions seem to follow logically the diagnostic studies which they reviewed. Thus, their reports seem more well reasoned than the report of Dr. Connelly. While the cross-examination of Dr. Altmeyer was revealing and effective, it was insufficient to show true bias on the part of Dr. Altmeyer or that Dr. Altmeyer would lie under oath. While Dr. Garson may have disagreed with Dr. Altmeyer's interpretation of 1984 blood gas studies and vent studies, no physician discredited Dr. Altmeyer's most recent report of May 14, 1987. There is no circumventing the fact that Dr. Connelly based his conclusion on Claimant's subjective complaints and a chest x-ray. While

his report may establish that the Claimant has pneumoconiosis and that he has a respiratory impairment, this report does not provide the nexus between the two. He agreed that Claimant's cigarette smoking was significant and that he was overweight. I believe the greater weight of the evidence shows that, as Dr. Morgan explained in his report of May 4, 1987, Claimant's hypoxemia can be attributed to his obesity and cigarette smoking. For these reasons, I feel the greater weight of the evidence fails to show that the Claimant's pneumoconiosis has caused his totally disabling respiratory or pulmonary impairment.

Relation of Pneumoconiosis and Coal Mine Employment

To establish entitlement to benefits under the Act, the Claimant must demonstrate that his pneumoconiosis arose at least in part out of coal mine employment. In this case, the miner was employed for 37 years in the nation's coal mines, and the rebuttable presumption, that the pneumoconiosis arose out of coal mine employment, is applicable (§ 718.203). Employer has failed to rebut this presumption.

Entitlement

Based on the finding in this case, that Claimant has failed to show that his respiratory impairment was caused by his pneumoconiosis, the Claimant is not entitled to benefits under the Act.

Attorney's Fees

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered to him in pursuit of his claim.

ORDER

The Claim of Joseph J. Skukan for benefits under the Act is hereby Denied.

/s/ Michael P. Lesniak
MICHAEL P. LESNIAK
Administrative Law Judge

MPL/lkw

NOTICE OF APPEAL: Any party dissatisfied with this Decision and Order may either make a request for reconsideration of it to this Office or appeal it to the Benefits Review Board *within 30 days* from the date this Decision and Order is filed, by filing a Motion for Reconsideration with this Office or by filing a Notice of Appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C., 20036 (See C.F.R. §§ 725.479, 725.481). (See also, § 725.310.)

FILED
JAN 14 1994
OFFICE OF THE CLERK

No. 93-964

In the Supreme Court of the United States

OCTOBER TERM, 1993

CONSOLIDATION COAL CO., PETITIONER

v.

JOSEPH J. SKUKAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

STEVEN J. MANDEL
Deputy Associate Solicitor

EDWARD D. SIEGER
Senior Appellate Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTION PRESENTED

In adjudicating claims for benefits under the Black Lung Benefits Act, the Department of Labor has long applied a "true doubt" rule, under which doubts on factual issues are resolved in favor of a claimant when the evidence is otherwise in equipoise. The question presented is whether use of the "true doubt" rule is permissible under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), and relevant Departmental regulations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Freeman United Coal Mining Co. v. *OWCP*, 988 F.2d 706 (7th Cir. 1993), petition for cert. pending, No. 93-935 (filed Dec. 10, 1993)	5, 6
Mullins Coal Co. v. *Director, OWCP*, 484 U.S. 135 (1987)	2, 4, 5
NLRB v. *Transportation Management, Inc.*, 462 U.S. 395 (1983)	6
Pauley v. *BethEnergy Mines, Inc.*, 111 S. Ct. 2524 (1991)	5
Santoro v. *Maher Terminals, Inc.*, petition for cert. pending, No. 93-474 (filed Sept. 23, 1993)	7

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 556(d) (§ 7)(c))	4, 5, 7
Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*	2, 7
30 U.S.C. 902(f)(1)(A)	3
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*	7
20 C.F.R.:	
Pt. 718	2
Section 718.202(a)(1)(ii)(C)	2
Section 718.204(b)	3
Pt. 727:	
Section 727.203	5

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-964

CONSOLIDATION COAL CO., PETITIONER

v.

JOSEPH J. SKUKAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-28) is reported at 993 F.2d 1228. The decisions and orders of the Benefits Review Board (Pet. App. 29-34) and the administrative law judge (Pet. App. 35-55) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1993, and a petition for rehearing was denied on August 24, 1993 (Pet. App. 1-2). On November 9, 1993, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including

December 17, 1993, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1983, after 37 years of coal mine employment, Joseph Skukan filed an application with the Department of Labor for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* Pet. App. 36-38 & n.2. Petitioner is the mine operator responsible for paying any benefits awarded under the statute. *Id.* at 38. In 1988 an administrative law judge (ALJ) denied benefits under the Department's regulations applicable to claims filed after March 31, 1980. *Id.* at 35-55; see 20 C.F.R. Pt. 718. The ALJ concluded that although the claimant had pneumoconiosis and suffered from a totally disabling respiratory or pulmonary impairment, the evidence failed to show that the disease caused the impairment. Pet. App. 41-54.

In finding the existence of pneumoconiosis, the ALJ considered seven positive and fourteen negative x-ray readings, all obtained between 1971 and 1987. Pet. App. 40-41. Because pneumoconiosis is a progressive disease, the ALJ gave the greatest weight to four readings of two x-rays taken in 1987. *Id.* at 41. Two of those readings were positive, and two negative; of those rendered by readers who were Board-certified radiologists or B-readers,[1] one was positive and two

[1] B-readers are physicians who have been specially certified as having demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis. See *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 145 n.16 (1987). "Board-certified" means certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association. 20 C.F.R. 718.202(a)(1)(ii)(C).

negative. *Id.* at 41-42. The ALJ stated that on the record he was left with a "true doubt" as to whether the claimant had pneumoconiosis, and he resolved that doubt in favor of the claimant. *Id.* at 42.

The ALJ found "overwhelming" evidence that the claimant was disabled due to a respiratory condition and could not return to his work as a coal miner.[2] Pet. App. 53. Relying on medical opinions submitted by petitioner, however, the ALJ determined that the claimant's totally disabling respiratory condition could be "attributed to his obesity and cigarette smoking." *Id.* at 54. The ALJ concluded that those opinions outweighed two others submitted by the claimant, because one of the claimant's doctors had not considered the claimant's smoking history in identifying a nexus between pneumoconiosis and the claimant's total disability, while the other doctor's report did not identify such a nexus at all. *Id.* at 53-54.

The Department of Labor's Benefits Review Board affirmed. Pet. App. 29-34. It concluded that the ALJ had permissibly found "true doubt" concerning the existence of pneumoconiosis, and thus resolved the issue in favor of the claimant. *Id.* at 33. The Board also concluded, however, that the ALJ had permissibly weighed the medical evidence in finding that pneumoconiosis did not cause the claimant's totally

---

[2] A miner is considered totally disabled if he cannot do his usual coal mine work or work comparable to it. 30 U.S.C. 902(f)(1)(A); 20 C.F.R. 718.204(b). In this case, the claimant, who had an eighth-grade education, worked as a general laborer. In that capacity he was required to walk up to one mile each day and to assist in setting 15-foot timbers that weighed 90 pounds per foot. Pet. App. 38-39.

disabling respiratory or pulmonary impairment. *Id.* at 31-32.

The court of appeals reversed. Pet. App. 2-28. It first observed that a claimant is totally disabled due to pneumoconiosis if his disability is due "at least in part" to the disease.[3] *Id.* at 9 (citation omitted). Applying that standard, the court concluded that the ALJ had improperly read one of the claimant's medical opinions as not providing a nexus between pneumoconiosis and his disability, when in fact the report "clearly and explicitly deal[t] with the disability causation." *Id.* at 11. The court also determined that the ALJ had given too much weight to petitioner's medical opinions, because those opinions were premised on findings that the claimant was not disabled and did not have pneumoconiosis. *Id.* at 12. Because those findings were contrary to the ALJ's assessment of the evidence, the court reasoned that the reports' additional conclusions concerning causation were "of little help to the analysis." *Ibid.* The court therefore held that the claimant had satisfied his burden of proving that his disability was caused by pneumoconiosis. *Id.* at 13.

The court of appeals also upheld the ALJ's use of the "true doubt" rule to find the existence of pneumoconiosis. Pet. App. 13-27. The court found the rule to be consistent both with Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d), and with the Department of Labor's regulations. First, the court reviewed this Court's decision in *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135 (1987),

---

[3] The court agreed with the ALJ that the evidence that the claimant was totally disabled within the meaning of the applicable regulations was "overwhelming." Pet. App. 28.

which had referred to the "true doubt" rule in construing the Department's earlier "interim presumption" regulation,[4] and agreed with the Seventh Circuit that "[f]ar from casting doubt on the true doubt rule," the Court in *Mullins* had "treat[ed] the rule as a reasonable interpretation of the regulations." Pet. App. 17 (quoting *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706, 712 (7th Cir. 1993), petition for cert. pending, No. 93-935 (filed Dec. 10, 1993)); see also Pet. App. 19 (characterizing the Seventh Circuit's reading of *Mullins* in this respect as "persuasive, correct and applicable to [the current regulations] as well").

The court further held (Pet. App. 18-27) that the "true doubt" rule is consistent with the generally applicable preponderance-of-the-evidence standard under Section 7(c) of the APA, 5 U.S.C. 556(d). Again agreeing with the Seventh Circuit in *Freeman United*, the court concluded that the "true doubt" rule does not impose a lower standard of proof, but rather represents "nothing more than a judicial assignment of the burden of persuasion to the employer." Pet. App. 18 (quoting *Freeman United*, 988 F.2d at 711). The court viewed such an assign-

---

[4] The interim presumption regulation, 20 C.F.R. 727.203, applies only to claims filed with the Department of Labor before April 1, 1980. It affords a presumption of eligibility to a miner who has at least ten years of coal mine employment and meets one of four medical requirements. See *Pauley* v. *BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2528-2529 (1991); *Mullins Coal*, 484 U.S. at 139. In *Mullins*, this Court held that a claimant could not automatically invoke the interim presumption by presenting any one item of qualifying evidence, but instead must prove the facts necessary for invocation by a preponderance of the evidence. 484 U.S. at 146-161.

ment as permissible because the APA requires the claimant to bear only a burden of production, and the "true doubt" rule does not relieve a claimant of that burden. Pet. App. 20-24 (citing *Freeman United*, 988 F.2d at 711; *NLRB* v. *Transportation Management, Corp.*, 462 U.S. 393, 403 n.7 (1983)). The court also concluded that the "true doubt" rule furthers the legislative goal of resolving doubts in favor of claimants (Pet. App. 19 & n.8), and is consistent with the Department's current regulations (*id.* at 24-25). Finally, the court noted that both the Benefits Review Board and the courts of appeals have used the "true doubt" rule to resolve conflicts involving contradictory but otherwise equally probative x-ray evidence. *Id.* at 25-26.

Having upheld the "true doubt" rule, the court determined that the ALJ had permissibly applied that rule to the x-ray evidence in this case. Pointing out that the evidence included conflicting readings by several B-readers and Board-certified radiologists, including conflicting readings of the most recent x-rays, the court found that the ALJ had "considered the conflicting X-ray evidence and the qualifications of the physicians interpreting the X-rays, accorded greater weight to the most recent X-ray evidence, and permissibly found that true doubt existed on the issue of the existence of pneumoconiosis." Pet. App. 27. The court accordingly concluded that substantial evidence supported the ALJ's invocation of the "true doubt" rule to resolve the issue in favor of the claimant. *Ibid.*

ARGUMENT

The principal question presented in this case is the same as that presented in the government's pending

petition for a writ of certiorari in *Director, OWCP* v. *Greenwich Collieries* and *Director, OWCP* v. *Maher Terminals*, No. 93-744 (*Greenwich Collieries*), concerning the validity of the "true doubt" rule that the Department of Labor applies under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, and the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*[5] In the decisions at issue in *Greenwich Collieries*, the Third Circuit held that the "true doubt" rule is inconsistent with Section 7(c) of the APA and the Department's current regulations under the BLBA. In this case, the court of appeals held that the rule does not conflict with Section 7(c) or with those regulations.

As we explain in our petition in *Greenwich Collieries*, the "true doubt" rule is consistent with both the BLBA and the APA, and the conflict among decisions of the courts of appeals regarding its validity warrants review by this Court. *Greenwich Collieries*, however, offers a better vehicle for review than does this case. The petition in *Greenwich Collieries* presents the question under both the LHWCA and the BLBA, while this case presents the question only under the BLBA. In addition, the petition in this case also presents (see Pet. i) two factbound questions that do not independently merit

---

[5] The same question is presented by the pending petitions in *Santoro* v. *Maher Terminals, Inc.*, No. 93-474 (which also seeks review of one of the decisions involved in *Greenwich Collieries*), and in *Freeman United Coal Mining Co.* v. *Jones*, No. 93-935. The petitioner in *Freeman United* has requested that its petition be held pending a decision on the petition in *Greenwich Collieries*. 93-935 Petitioner's Motion to Hold Ruling on Petition for Certiorari in Abeyance (served Dec. 16, 1993).

review, but that could, if reached, make it unnecessary to determine the validity of the "true doubt" rule.[6] We therefore suggest that the Court hold this petition pending disposition of the petition in *Greenwich Collieries*. We note that petitioner consents (Pet. 11) to holding this case in abeyance pending resolution of the issues presented in *Greenwich Collieries*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of the petition in *Director, OWCP* v. *Greenwich Collieries* and *Director, OWCP* v. *Maher Terminals*, petition for certiorari pending, No. 93-744.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

STEVEN J. MANDEL
Deputy Associate Solicitor

EDWARD D. SIEGER
Senior Appellate Attorney
Department of Labor

JANUARY 1994

---

[6] Petitioner "reserves the right to argue" (Pet. i) that the court of appeals erred in affirming the ALJ's determination that the x-ray evidence was in equipoise and in reversing the ALJ's determination that the claimant's disability was not caused, even in part, by pneumoconiosis. A finding either that the claimant did not have pneumoconiosis or that the disease caused no disability would result in a denial of benefits, regardless of the validity of the "true doubt" rule. See Pet. App. 31.